United States Court of Appeals

for the Second Circuit

APPENDIX

76-7524

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United States Court of Appeals

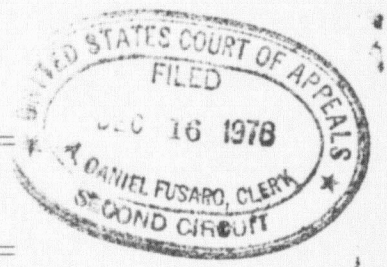
For the Second Circuit.

NORTH SHORE TRAVEL SERVICE, Inc.,
Plaintiff-Appellant,

against

JOSEPH F. HINTERSEHR, etc., et al.,
Defendents-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York.



APPENDIX.

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UNITED STATES COURT OF APPEALS,

For The Second Circuit.

- X

NORTH SHORE TRAVEL SERVICE, INC.,

Plaintiff-Appellant,

against

JOSEPH F. HINTERSEHR, etc., et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

- X

DOCKET ENTRIES.

76C 538

NORTH SHORE TRAVEL SERVICE vs [illegible] et al

DATE	NR.	PROCEEDINGS
-19-76		Complaint filed. Summons issued. (1) (cg)
-16-76		Stip. dtd 4-8-76 that the time of the defts to answer the complaint is extended to 5-14-76 filed. (2)
[illegible]		[illegible]
/18/76		Notice of Motion to Dismiss, ret. 6/14/76 filed. (3)
/18/76		Memorandum of Law in Support of Deft's Motion to Dismiss or in the Alternative for Summary Judgment filed. (4)
-20-76		Summons ret and filed/unexecuted as to Continental Air Lines; Hawaiian Airlines; North Central Airlines. (5)
-28-76		Notice of motion for partial summary judgment ret 6-4-76 filed. (6)
-1-76		Reply affidavit of John N. Romans filed. (6-A) (7)
-1-76		Reply affidavit of F. Monello filed.
-4-76		Before MISHLER, CH. J. - Case called. Pltff's motion for partial summary judgment submitted. Decision reserved.
-9-76		Letter of John N. Romans to Judge Mishler dtd 7-15-76 filed with annexed copy of decision in similar action, etc. (8)
-22-76		By MISHLER,J.- Memo and order dtd. 9-21-76 gtranting defts motion for summary judgment and denying pltff's cross-motion for partial summary judgment filed. (9)
-22-76		Judgment that pltff take nothing of the defts and that defts motion for summary judgment is granted and pltff's cross-motion for partial summary judgment is denied filed.

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DOCKET ENTRIES

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PLAINTIFFS

NORTH SHORE TRAVEL SERVICE, INC.

NORTH SHORE TRAVEL SERVICE, INC.

DEFENDANTS

HINTERSEHR, JOSEPH F., et al

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporat association; PAUL R. IGNATIUS, as President of t Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traff Conference of America, a division of the Air Transport Association of America; WILLIAM M. HAWKINS, JR., as Executive Secretary of the Airli Finance and Accounting Conference, a division of the Air Transport Association of America, AIR CANADA, ALLEGHENY AIRLINES,INC., ALOHA AIRLINES, AMERICAN AIRLINES, INC., BRANIFF INTERNATIONAL, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, EASTERN AIR LINES, INC., HAWAIIAN AIR LINES, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, NORTHWEST AIRLINES, OZARK AIR LINES, PIEDMONT AVIATION, SOUTHERN AIRWAYS, TRANS WORLD AIRLINES INC., and UNITED AIR LINES, INC.

Defendants.

28 USC 1332 - antitrust action and
Seeks: $2,259,082.00.

ATTORNEYS

FOR PLNTFF:
BERNARD MEYERSON
16 Court Street
Brooklyn, New York 11241
212-643-1335

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				JS-6	
				JS-8	

DOCKET ENTRIES

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NORTH SHORE TRAVEL SERVICE, INC.

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FILING FEES PAID			STATISTICAL CARDS	
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NOTICE OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NORTH SHORE TRAVEL SERVICE, INC., Plaintiff, -against- JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association; PAUL R. IGANTIUS, as President of the Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; and WILLIAM M. HAWKINS, JR. as Executive Secretary of the Airline Finance and Accounting Conference, a division of the Air Transport Association of America, AIR CANADA, ALLEGHENY AIRLINES, IN., ALOHA AIRLINES, AMERICAN AIRLINES, INC., BRANIFF INTERNATIONAL, CONTINTNTAL AIR LINES, INC., DELTA AIR LINES, EASTERN AIR LINES, INC., HAWAIIAN AIR LINES, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, NORTHWEST AIRLINES, OZARK AIR LINES, PIEDMONT AVIATION, SOUTHERN AIRWAYS, TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC. Defendants.	76 Civ.538(JM) NOTICE OF MOTION TO DISMISS

PLEASE TAKE NOTICE, that upon the affidavit of Richard R. Saunders sworn to May 5, 1976, the affidavit of John N. Romans sworn to May 14, 1976, named defendants' statement pursuant to general rule 9(g) and upon the summons and complaint, the undersigned will move this Court before the Honorable Jacob Mishler, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn,

NOTICE OF MOTION TO DISMISS.

New York on the 4th day of June, 1976, at 10:00 a.m. or as soon thereafter as counsel may be heard for an order pursuant to Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure, that the Complaint be dismissed for failure to state a cause of action, and for such further relief as to this Court may seem just and proper.

Dated: New York, New York
May 14, 1976

CHADBOURNE, PARKE, WHITESIDE & WOLFF

By _____
A Member of the Firm
Attorneys for all Defendants
except Hawaiian Airlines, Inc., and
North Central Airlines, Inc.
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New York, New York 10020
(212) 541-5800

TO: BERNARD MEYERSON, ESQ.
Attorney for Plaintiff
16 Court Street
Brooklyn, New York 11241
(212) 643-1335

STATEMENT PURSUANT TO RULE 9 [g] OF THE GENERAL RULES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NORTH SHORE TRAVEL SERVICE, INC.,	:	
Plaintiff,	:	76 Civ. 538 (JM)
-against-	:	STATEMENT PURSUANT TO RULE 9(g) OF THE GENERAL RULES
JOSEPH F. HINTERSEHR, etc., et al.,	:	
Defendants.	:	

The following are material facts as to which defendants contend there is no genuine issue to be tried:

1. North Shore Travel Service, Inc., ("North Shore") a travel agent in Syosset, New York, signed a contract with the Air Traffic Conference of America ("ATC") entitled the Air Traffic Conference Sales Agency Agreement (the "Agency Agreement").

2. ATC is a division of the Air Transport Association of America ("ATA") an unincorporated association whose members consist of the scheduled airlines of the United States.

3. The 17 airlines ("Airlines") named in the complaint are all members of ATA with the exception of Air Canada which is an associate member.

4. Pursuant to the Agency Agreement, North Shore agreed to hold ATC's airline ticket stock in trust and to remit the proceeds from ticket sales, less commissions, to the Airlines' designated area bank three times each month.

STATEMENT PURSUANT TO RULE 9 [g] OF THE GENERAL RULES

5. Three of North Shore's checks drawn to the order of ATC for the reporting periods April 30, May 30, and July 10 in the amounts of $14,688.67, $16,062.18 and $16,917.40, respectively, were dishonored by North Shore's bank.

6. Despite demand therefor, North Shore refused to surrender the ATC airline ticket stock which it held in trust for ATC.

7. ATC instituted a replevin action in New York Supreme Court, Nassau County, to recover possession of the tickets in July, 1974.

8. A full probable cause hearing before Justice Altimari was held on August 1, 1974 during which witnesses on behalf of North Shore appeared and testified and North Shore, through its attorney, fully cross-examined the witness appearing on behalf of ATC.

9. While ATC offered to post a bond in the amount of $913,197.92, North Shore waived the furnishing of any bond. The action was tried in October, 1974 after which the court held that North Shore's bank acted properly in returning the three checks unpaid; automatic suspension of North Shore by ATC pursuant to the Agency Agreement was justified and legally proper; North Shore's affirmative defenses and counterclaims were dismissed; and ATC was entitled to possession of the ticket stock.

10. The Appellate Division, Second Department affirmed the trial court's decision noting that North Shore's "claim at

STATEMENT PURSUANT TO RULE 9[g] OF THE GENERAL RULES

the trial, and its contentions on appeal, were founded on suspicion and not on evidence. Further, the method of valuation of the ticket stock was rational, objective and for [North Shore's] benefit."

11. North Shore's attempt to appeal to the New York Court of Appeals as of right was dismissed by the court sua sponte on May 6, 1976.

12. North Shore was required to maintain a bond pursuant to a provision of the Agency Agreement, which provision has been approved by the Civil Aeronautics Board.

13. North Shore was warned by its bonding company on July 30, 1974 and by ATC on August 7, 1974 that it was obligated to reinstate or replace its bond and that if it did not do so the Agency Agreement would be cancelled.

14. North Shore neither reinstated nor replaced the bond.

15. On October 11, 1974, ATC informed North Shore by certified mail that its Agency Agreement was terminated.

Dated: New York, New York
May 14, 1976

CHADBOURNE, PARKE, WHITESIDE & WOLFF

By _____

A Member of the Firm
Attorneys for Defendants
30 Rockefeller Plaza
New York, New York 10020
(212) 541-5800

AFFIDAVIT OF RICHARD R. SAUNDERS IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

- -x

NORTH SHORE TRAVEL SERVICE, INC.,

Plaintiff,

-against-

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association: PAUL R. IGNATIUS, as President of the Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; and WILLIAM M. HAWKINS, JR., as Executive Secretary of the Airline Finance and Accounting Conference, a division of the Air Transport Association of America, AIR CANADA, ALLEGHENY AIRLINES, INC., ALOHA AIRLINES, AMERICAN AIRLINES, INC., DELTA AIR LINES, EASTERN AIR LINES, INC., HAWAIIAN AIR LINES, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, NORTHWEST AIRLINES, OZARK AIR LINES, PIEDMONT AVIATION, SOUTHERN AIRLINES, TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC.,

Defendants.

76 Civ. 538(JM)

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

- -x

DISTRICT OF COLUMBIA)
: ss.:
CITY OF WASHINGTON)

RICHARD R. SAUNDERS, being duly sworn, deposes and says:

1. I am Director-Agencies of the Air Traffic Conference of America. I am fully familiar with the facts of this action and make this affidavit in support of defendants' motion to dismiss the complaint or in the alternative for summary judgment.

AFFIDAVIT OF RICHARD R. SAUNDERS IN SUPPORT OF MOTION

The Parties

2. Plaintiff, North Shore Travel Service, Inc., ("North Shore") is a New York corporation engaged in business as a travel agent at 40 Underhill Boulevard, Syosset, New York.

2. Joseph F. Hintersehr and the other individual defendants are officers of the Air Transport Association of America ("ATA") an unincorporated association whose members consist of the scheduled airlines of the United States. The Air Traffic Conference of America ("ATC") is a division of ATA which is responsible for the administration of the relationship between the member airlines and travel agencies. The seventeen named airlines ("Airlines") are all members of ATA with the exception of Air Canada which is an associate member.

The Complaint

4. The complaint alleges two causes of action. North Shore's first claim in anti-trust alleges a conspiracy among the defendants to put North Shore out of business. North Shore's second claim alleges that in its action to replevy the ATC airline tickets from North Shore, ATC fixed too high a value on the ATC blank airline tickets, i.e. $456,598.96 and offered to post too high a bond, i.e. twice the value $913,197.92, and North Shore was unable to post a similar bond and reclaim the tickets. Therefore, reasons North Shore, Section 7102(e) of the New York CPLR is unconstitutional as it violated the Equal Protection Clause of the Fourteenth Amendment.

AFFIDAVIT OF RICHARD R. SAUNDERS IN SUPPORT OF MOTION

Defendants' Legal Position

5. In the accompanying memorandum of law defendants contend that the complaint should be dismissed because it fails to state a claim upon which relief can be granted in that:

a. The conduct of defendants was in conformance with a procedure calculated to serve the public interest and approved by the Civil Aeronautics Board. As North Shore admits, the conduct of defendants, authorized by the Civil Aeronautics Board, is immune from the operation of the antitrust laws (Complaint ¶¶ 15-19).

b. North Shore's unfounded charges have been finally determined after a plenary trial by a New York Supreme Court judge whose judgment was unanimously affirmed by the Appellate Division, Second Department.* North Shore is collaterally estopped, therefore, from trying these issues again.

The Agreement Between North Shore and ATC

6. North Shore, as an ATC approved travel agent, entered into an agreement with ATC known as the Air Traffic Conference

*North Shore purports to have an appeal of right to the New York Court of Appeals based on its "constitutional" argument but the appeal has not yet been perfected.

Sales Agency Agreement (the "Agency Agreement"). A copy of the text of the Agency Agreement is annexed as Exhibit "A." The Agency Agreement is a standard form of agreement approved by the Civil Aeronautics Board pursuant to §§ 412 and 414 of the Federal Aviation Act, 49 U.S.C. §§ 1382, 1384. It provides that "All ticket forms . . . shall be held in trust by the agent. . . and will be surrendered on demand" to ATC's designated representative acting pursuant to ATC's Agency Resolution. (Exhibit A, ¶4). Over 10,000 travel agents throughout the United States are parties to it. North Shore agreed to sell the tickets at published tariff rates and to remit the proceeds of such sales, less commissions, to the Airlines' designated area bank three times each month. Every ten days approximately $130 million dollars and 950,000 documents are handled through the system, and it is of great importance that these monies and documents be processed in a timely manner.

7. If a travel agent remits the proceeds to ATC late, postmarked more than 3 working days after the end of the reporting period, it is charged with one late remittance. If the agent is guilty of four late remittances within a period of twelve consecutive months its authority to act as an approved ATC travel agent is suspended.* A suspended travel agent is required to

---

*Late remittances are calculated as follows. One late remittance is charged for a report and a check which is postmarked more than 3 working days after the close of the reporting period. Two late remittances are charged for a dishonored check, provided, however, that if the agent wires funds to the area bank within a given grace period only one late remittance is charged.

surrender its airline ticket stock until it is reinstated as an approved ATC agent by (1) mail vote of the Airlines or (2) approval by ATC's Agency Committee upon review.*

North Shore's Failure to Effect Timely Remittances under the Agency Agreement

8. In March, 1971 North Shore was suspended for having submitted two dishonored checks thereby accumulating four late remittances. It was reinstated on April 9, 1971 by a mail vote after it agreed to increase its capital to prevent any further dishonoring of its checks.

9. In early 1974, North Shore accumulated a number of late remittances. The reports for February 20, February 28, March 10, and March 20, 1974 did not arrive at ATC's area bank on time. While the originals of the first three reports never arrived in the mail, the March 20 report, postmarked March 25,

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*The procedure for reinstatement of a travel agent following four late remittances is set forth in Section VII C4 of ATC's Agency Resolution, incorporated by reference in the Agency Agreement under ¶26 of that agreement. The agent may elect to seek fast reinstatement by mail vote. The mail vote process is effected upon transmittal by ATC of the agent's request for reinstatement. The agent is automatically reinstated unless within fifteen days thereafter a member airline requests "that the matter be held for review by the Agency Committee". If the agent does not choose the mail vote process the matter is referred to the Agency Committee. The agent is given 45 days advance notice and an opportunity to submit rebuttal evidence. If the agent is disapproved by the Agency Committee and protests such disapproval, the controversy, as required by the Civil Aeronautics Board's approval of the Agency Agreement, 29 CAB 258, 266 (1959), is submitted to arbitration. The Agency Agreement and the ATC Agency Resolution have been upheld by the courts, see e.g., Edison Travel, Inc. v. American Airlines, Inc., 35 N.Y.2d 801 (1974) Crown Travel Service, Inc. v. Air Traffic Conference, 270 F. Supp. 305 (D. New Jersey, 1967).

finally arrived on April 18. North Shore's check for the April 30, 1974 report was dishonored. Following these occurrences, North Shore was suspended on May 21, 1974 but the suspension was withdrawn when North Shore presented copies of certified mail receipts for the periods February 28 and March 10.

The First State Court Trial

10. Thereafter, North Shore's check for the May 31 reporting period was dishonored. Funds were not wired to cover the May 31 dishonored check so that check counted as two late remittances. ATC suspended North Shore for having accumulated four late remittances concerning the February 20, April 30, and May 31, 1974 reporting periods. When it refused to surrender its tickets to a representative of ATC pursuant to the Agency Agreement, a replevin action was commenced and tried in Nassau Supreme Court before Justice DiPaola in July, 1974. Justice DiPaola held in an opinion annexed as Exhibit "B" that:

> "It is equally inferrable that the non-delivery [of the February 20, 1974 check] was the result of postal service delivery failure or failure of the area bank to properly receive and credit the communication of the report.
>
> "There is convincing proof that the defendant did violate the terms of their agreement with respect to the reports that were due for the periods ending April 30, 1974 and May 31, 1974, the latter incident involving two violations. The defendant is, therefore, chargeable with three violations, the first commencing April 30, 1974. This is one less than is required to sustain a suspension."

T OF RICHARD SAUNDERS IN SUPPORT OF MOTION

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The First State Court Trial

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AFFIDAVIT OF RICHARD R. SAUNDERS IN SUPPORT OF MOTION

The Second State Court Trial

11. Subsequently, North Shore's check for the July 10 reporting period was dishonored and funds were not wired to the area bank. North Shore's dishonored checks included the checks for the reporting periods of April 30, May 30 and July 10 in amounts of $14,688.67. $16,062.18 and $16,917.40, respectively. Since a dishonored check counts as two late remittances, North Shore was guilty of more than four late remittances in a period of less than twelve consecutive months; it had accumulated 5 late remittances in only 2 1/2 months. As a result, North Shore's authority to act as an approved ATC travel agent was suspended and North Shore was required to surrender the airline ticket stock it held in trust for the benefit of the Airlines.

12. Despite demand therefor, North Shore refused to surrender the airline ticket stock. ATC, therefore, instituted a second replevin action to recover possession of the tickets.

13. ATC's second state court proceeding was instituted on notice to North Shore by an order to show cause, returnable in the Supreme Court, Nassau County. A full probable cause hearing before Justice Altimari was held on August 1, 1974. At this hearing witnesses on behalf of North Shore appeared and testified, and North Shore, through its attorney, fully cross-examined the witness appearing on behalf of ATC. At the conclusion of the probable cause hearing, the court issued an order directing the Sheriff of Nassau County to seize the airline ticket stock held

by North Shore.

14. Pursuant to New York CPLR Section 7102(e), ATC offered to file an undertaking in the amount of $913,197.92, twice the value of the 2,602 tickets wrongfully withheld from ATC.* North Shore, however, waived the furnishing of any bond. Presumably it recognized that the cost of the bond might be taxable against it, should ATC be held entitled to the return of the ticket stock. By stipulation of both North Shore and ATC the order of seizure provided that the sheriff would hold the chattels pending the trial of the action, rather than turn the chattels over to ATC after the ten-day period prescribed by CPLR Section 7102(f).

15. Prior to the second trial North Shore impleaded the Hempstead Bank ("Bank") where it had its checking account, and two of the Bank's employees who had testified at the first trial. North Shore alleged six counterclaims against ATC and/or the Bank: first, that ATC induced the Bank to breach its contract with North Shore and wrongfully dishonor North Shore's checks, claiming

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*ATC carefully calculated the dollar price of the average airline ticket sold by North Shore, based on North Shore's actual sales over a period of three months (Tr. 109). This resulted in an average price of $175.48 per ticket (Tr. 109). 2,602 tickets were wrongfully withheld by North Shore (29a). Accordingly, the aggregate value of the chattels claimed was fixed at $456,598.96(30a). Manifestly, there can be no more accurate way of calculating the value of the tickets held by North Shore on August 1, 1974 than to base such valuation on the average of North Shore's actual sales. Indeed, this is the only practical way to fix such value.

damage of $1,000,000; second, that the Bank wilfully and maliciously dishonored North Shore's checks thereby ruining its reputation, claiming damage of $1,000,000; third, that two Bank employees gave testimony at the first trial which was "false, untrue and perjurious," claiming damage of $1,000,000; fourth, that the Bank negligently dishonored North Shore's checks causing North Shore "great mortification, mental stress and anguish" claiming damage of $1,000,000; fifth, that North Shore complied with the mail vote procedure of the Agency Agreement but was not reinstated, claiming damage of $1,000,000; and finally, that ATC and the Bank "wilfully, intentionally and maliciously prevented North Shore from operating his business," claiming damages of $500,000.

16. The action came on to trial before Justice Lynde on October 24, 1974. Following the trial and the filing of post-trial briefs, Justice Lynde in an opinion annexed as Exhibit "C" held:

> "The credible evidence adduced by the Hempstead Bank permits this Court to conclude that North Shore, in June and July of 1974 did not have sufficient collected funds in its account and the Bank acted properly in returning the checks unpaid. Furthermore, there existed no valid agreement requiring the Bank to pay such checks against insufficient or uncollected funds.
>
> * * *
>
> "Automatic suspension of North Shore by ATC, pursuant to the terms of the agreement between the parties, was justified and legally proper.

if North Shore's counsel concluded that the order is not appealable as of right that it consent to the dismissal of the appeal. If he wished to persist in the appeal he was invited to present his comments within 10 days. Counsel for North Shore commented that "the double bond requirement . . . was substantially involved in the appeal." ATC commented that the question was "not directly involved" because North Shore had waived the furnishing of any bond and that North Shore's constitutional basis for appeal was, therefore, not substantial. The parties have not yet been advised of the disposition of the New York Court of Appeals based on the comments and the appeal has not yet been perfected by North Shore by the serving and filing of the record and briefs.

North Shore Owed ATC Member Airlines $24,074.51

19. Contrary to the allegations of paragraph 22 of the complaint that ATC refused "to reimburse Plaintiff for tickets it refunded and returned, which amount to $7,082.90," the fact is that the ATC member airlines fully credited North Shore with that amount. The ATC member airlines actually had claims against North Shore in the amount of $24,074.51. The $7,082.90 which North Shore claims to be owed reduced the North Shore debt to $16,991.61.

North Shore Compelled Its Own Cancellation by Refusing to Maintain a Bond

20. Pursuant to paragraph 5A of the Agency Agreement

AFFIDAVIT OF RICHARD R. SAUNDERS IN SUPPORT OF MOTION

North Shore is required to procure and maintain a bond for the benefit of the members of ATC. Prior to August, 1974, North Shore complied with this provision of the agreement by maintaining a bond in the amount of $20,000 with the Insurance Company of North America. On July 30, 1974, however, the Insurance Company of North America informed both North Shore and ATC that in accordance with the terms and conditions of the bond it elected to cancel that bond effective August 29, 1974. On August 7, 1974 ATC notified North Shore by certified mail:

> "that unless the aforementioned bond is reinstated or replaced, in the proper form and amount, prior to the effective date of its cancellantion, we shall have no alternative but to terminate your Sales Agency Agreement for non-compliance with Paragraph 5.A thereof."

A copy of the letter is annexed as Exhibit "D."

21. North Shore neither reinstated nor replaced the bond. Therefore, on October 11, 1974, ATC informed North Shore by certified mail (Exhibit "E" annexed) that its Agency Agreement was terminated effective August 29, 1974, and that:

> "Accordingly, as you undoubtedly have recognized, your agency has been withdrawn from the agenda of the ATC Agency Committee for review at its December 2-6, 1974 meeting.
>
> "As aforesaid, we shall proceed with our claim against your surety as soon as appropriate documentation has been received from all carriers."

22. No reply was received from North Shore concerning this letter.

23. The Insurance Company of North America which held a

AFFIDAVIT OF RICHARD R. SAUNDERS IN SUPPORT OF MOTION

surety bond for only domestic transportation paid $12,008.29 to the ATC member airlines and presumably has a subrogation claim against North Shore in that amount. North Shore, therefore, still owes the ATC member airlines $4,983.32, and the Insurance Company of North America $12,008.29.

Richard R. Saunders

Richard R. Saunders

Sworn to before me this
5th day of May, 1976.

M. Andrea Thibeau
Notary Public

My Commission Expires May 31, 1978

SUPREME COURT – NASSAU COUNTY.
Pltf. Deft. Pat. Recp. Evid. Identf.
EXHIBIT 2
JUL 1974
JOSEPH MALONE
Official Reporter

"EXHIBIT A"
Annexed to Affidavit of
Richard R. Saunders

MEMORANDUM OF AIR TRAFFIC CONFERENCE SALES AGENCY AGREEMENT

THIS AGREEMENT, made and entered into this day of by and between the undersigned agent acting for the several air carriers which are parties to the Air Traffic Conference Agency Resolution (copies of which are on file and available for inspection at the offices of the Civil Aeronautics Board, Washington, D.C., the office of the Executive Secretary of the Air Traffic Conference of America, Washington, D.C., and the general offices of the air carriers which are members of the Air Traffic Conference of America),

and

.....,

a .....,

having its principal office at .....

..... (hereinafter called "the Agent").

WITNESSETH

That, for and in consideration of the mutual covenants and agreements therein contained, the parties hereto do hereby enter into and agree to be bound by the terms and conditions of the Air Traffic Conference Sales Agency Agreement (Form ATC–5A, 13th Rev.), a copy of which is attached to the Agent's copy hereof, and incorporated into and made a part of this Memorandum of Agreement.

IN WITNESS WHEREOF,

Witness:

....
acting as agent for the several air carriers which are parties to the Air Traffic Conference Resolution

.....

Witness:

..... Agent

NASSAU COUNTY
2 (EV)
OCT 24 1974
OFFICIAL REPORTER

..... By .....
(Name)

....
(Title)

ATC COPY

"EXHIBIT A"
Annexed to Affidavit of
Richard R. Saunders

MEMORANDUM
OF
AIR TRAFFIC CONFERENCE
SALES AGENCY AGREEMENT

THIS AGREEMENT, made and entered into this day of by and between the undersigned agent acting for the several air carriers which are parties to the Air Traffic Conference Agency Resolution (copies of which are on file and available for inspection at the offices of the Civil Aeronautics Board, Washington, D.C., the office of the Executive Secretary of the Air Traffic Conference of America, Washington, D.C., and the general offices of the air carriers which are members of the Air Traffic Conference of America),

and

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a .....,

having its principal office at .....

..... (hereinafter called "the Agent").

WITNESSETH

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IN WITNESS WHEREOF,

Witness:

....
acting as agent for the several air carriers which are parties to the Air Traffic Conference Resolution

.....

Witness: ..... Agent

..... By .....
(Name)

....
(Title)

AGENT'S COPY

"EXHIBIT A"
Annexed to Affidavit of
Richard R. Saunders

AIR TRAFFIC CONFERENCE
Sales Agency Agreement

1. Effectiveness:

This Agreement shall become effective as between the Agent and any individual air carrier, which is a party to the Air Traffic Conference Agency Resolution, only if such carrier (hereinafter called "the Carrier") delivers to the Agent a Certificate of Appointment, duly executed by or on behalf of the Carrier, authorizing the Agent to represent the Carrier subject to the terms and conditions of this Agreement.

The delivery of said Certificate of Appointment by the Carrier to the Agent shall be deemed a ratification and adoption of this Agreement by the Carrier and thereafter this Agreement shall have the same force and effect between the Carrier and the Agent as though they were both named herein and as though they had both subscribed their names hereto on the date appearing on said Certificate of Appointment.

2. Scope of Agent's Authority and Activities:

The authority of the Agent to represent the Carrier shall be specifically limited to the authority expressly granted by this Agreement.

During the term of this Agreement, the Agent shall represent the Carrier for the purpose of promoting and selling air passenger transportation offered by the Carrier. In selling such transportation, the Agent shall conform to and observe the tariffs, rules, regulations and instructions issued by the Carrier, and the applicable terms and conditions of tickets and exchange orders of the Carrier issued or used by the Agent. The Agent shall furnish information to its clients and the public concerning the Carrier's air passenger transportation services in conformance with current authorized forms, folders, advertising, schedules, tariffs, rules, regulations and instructions issued by the Carrier.

The Agent shall exercise the authority granted by this Agreement, and represent itself as an agent of the Carrier, only at or through such places of business operated by the Agent as are included from time to time on the ATC Agency List maintained pursuant to the ATC Agency Resolution.

The promotional and sales activities of the Agent on behalf of the Carrier shall not be restricted as to territory, except that, if such territory is at any time limited in writing by the Carrier, the Agent's activities shall be strictly confined within such limits. The Carrier may at any time appoint other agents, in addition to the Agent, in any territory for the purpose of promoting and selling air passenger transportation offered by it.

The Agent shall not sell or issue tickets or exchange orders covering air passenger transportation offered by the Carrier to persons who plan to sell, issue, or offer to sell or issue, such transportation documents, but who have not been authorized by the Carrier to represent the Carrier.

In selling air passenger transportation hereunder, the Agent shall use, in the following order of preference, the airline identification plate of air carriers which are parties to the Air Traffic Conference Agency Resolution:

a. The Carrier through which the reservation is made, provided such Carrier participates in the routing, or
b. The Carrier performing the first sector of the transportation, or
c. If the Agent does not have either plate specified above, the plate of any Carrier which is scheduled to participate in the transportation, or
d. If the Agent does not have any of the plates specified above, the Agent may use the plate of any other Carrier.

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Any agent ticket delivery facility established, operated or maintained, directly or indirectly on the premises of any airport or within any airport terminal building may only be used for tickets actually issued at an authorized agency location and delivered to such facility by the Agent.

3. Designation of Agency:

The Agent may represent himself, on letterheads, advertising, telephone listings and classifications, office signs, and otherwise, as an "Agent" or "Travel Agent" representing the Carrier, but shall not represent himself as a "General Agent" or use any other designation (such as "Air Lines Ticket Office" or "Consolidated Air Lines Ticket Office") which would indicate or imply in any way that his office is an office of the Carrier.

4. Issuance of Tickets and Exchange Orders:

In selling air passenger transportation on the lines of the Carrier, the Agent shall issue only Standard Agent's tickets or exchange orders supplied pursuant to this Agreement, except to the extent the Carrier (1) authorizes the Agent, in writing, to draw its own exchange orders on the Carrier, (2) supplies the Agent with, and instructs the Agent to use, envelope-type exchange orders, or (3) the Carrier provides the Agent with supplies of its ticket forms or exchange orders and enters into a Special Supplemental Sales Agency Agreement covering the issuance and use thereof, or (4) the Carrier provides the Agent with supplies of its ticket forms or exchange orders for issuance pursuant to the IATA Passenger Sales Agency Agreement. The Agent shall deliver to its clients the proper forms of tickets or exchange orders as authorized from time to time by the Carrier; and routing information, et cetera, shown on any such documents shall be in accordance with the applicable rules, regulations and instructions furnished to the Agent by the Carrier.

Standard Agent's ticket forms or exchange orders for issuance to the Agent's clients to cover transportation purchased will be supplied to the Agent by the Executive Secretary of the Airline Finance and Accounting Conference (hereinafter called "Secretary-AFAC") as agent for the Carrier.

All ticket forms and exchange orders supplied by or on behalf of the Carrier to the Agent shall be held in trust by the Agent until issued to the Agent's clients to cover transportation purchased, or until otherwise satisfactorily accounted for to the Carrier, or to the Secretary-AFAC.

The Agent will procure, at no expense to the Carrier, one or more validator machine(s), or ticket writer(s), of a type approved by the Secretary-AFAC, for use at each place of business covered by this Agreement in the issuance of Standard Agent's tickets or exchange orders pursuant to instructions issued from time to time by the Carrier or the Secretary-AFAC.

The Carrier may, at its option, provide the Agent with one or more airline identification plate(s) for use in the issuance of tickets in said validator machine or ticket writer. Such airline identification plate shall remain the property of the Carrier, and shall be returned to it upon demand or upon the termination of this Agreement as between the Agent and the Carrier.

Ticket forms and exchange orders supplied by or on behalf of the Carrier for issuance at a specified place of business covered by this Agreement shall not be issued at or through any other place of business, nor shall an airline identification plate supplied for use at a specified place of business be used at any other place of business.

5. Collections and Remittances:

The Agent shall report and remit three times each month for all transportation or ancillary services sold hereunder (and for which the Agent has issued Standard Agent's tickets or exchange orders, or drawn exchange orders on the Carrier). The first such report shall include all such sales during the first ten days of the month, the second shall include all such sales during the

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second ten days of the month, and the third shall include all such sales during the remaining days of the month. The report shall be on a form supplied by the Secretary-AFAC.

The Agent shall cause each such report, together with auditor's coupons, supporting documents and remittance, to be delivered to a bank designated by the Air Traffic Conference of America, not later than the close of banking hours on the fourth working day (i.e., excluding Saturdays, Sundays and federal and state legal holidays) following the last day of the period covered by the report: Provided, That the Agent shall be deemed to have complied with this requirement if the envelope containing the sales report, remittance and supporting documents is postmarked not later than midnight of the third working day.

If no transportation has been sold hereunder during any such period, the Agent shall, in lieu of a sales report, transmit a no sales report, on a form to be supplied by the Secretary-AFAC, to the designated bank.

The sales report shall account, in such manner as may be prescribed from time to time by the Carrier or by the Secretary-AFAC, for all sums due the Carrier hereunder, and for all transportation receipts and other required documents accepted by the Agent in payment for air transportation sold hereunder (and for which the Agent has issued Standard Agent's tickets or exchange orders, or has drawn exchange orders on the Carrier) pursuant to the Universal Air Travel Plan.

The Agent shall retain his duplicate copy of each sales report and his copies of supporting documents, for at least two years.

Remittances of moneys shall be made in official currency of the country in which the Agent is located, or its equivalent, unless otherwise instructed in writing by the Executive Secretary. If remittance is made by the Agent's check, the check shall be made payable in accordance with the instructions given from time to time by the Executive Secretary.

All moneys, less applicable commissions to which the Agent is entitled hereunder, collected by the Agent for air passenger transportation or ancillary services sold hereunder (and for which the Agent has issued Standard Agent's tickets or exchange orders or has drawn exchange orders on the Carrier) and all transportation receipts and other required documents accepted by the Agent in payment for air passenger transportation or ancillary services sold hereunder (and for which the Agent has issued Standard Agent's tickets or exchange orders or has drawn exchange orders on the Carrier) pursuant to the Universal Air Travel Plan, shall be the property of the Carrier, and shall be held in trust by the Agent until satisfactorily accounted for to the Carrier. The Agent shall, if so requested in writing by the Carrier, procure and maintain, or cause to be procured and maintained, for the benefit of the Carrier and without expense to the Carrier or the Air Traffic Conference of America, a bond or bonds providing such coverage, and in such amounts, as shall be satisfactory to the carrier.

The books and records of the Agent relating to the sale of transportation offered by the Carrier shall be open to inspection by the Carrier and/or an auditor or other duly authorized representative of the Air Traffic Conference of America.

5.A. Maintenance of Bond (Not Applicable in Canada):

The Agent shall, without expense to the Carrier or the Air Traffic Conference of America, procure and maintain, or cause to be procured and maintained, for the joint and several benefit of the members of the Air Traffic Conference of America, a bond or bonds, conditioned upon the Agent's compliance with the provisions of this Agreement with respect to remittances to the Carrier, in a form prescribed from time to time by the Agency Committee of said Conference in the minimum amount of $10,000, such amount to be increased whenever necessary to cover the average of the three highest months (of the last 12) gross sales of air transportation for the accounts of members of the Air Traffic Conference: Provided, That, (a) the Agent shall not be required to

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maintain said bond in an amount in excess of $50,000; (b) the Agent shall be relieved of the requirement to provide coverage in excess of the $10,000 minimum if:

1. the Agent is determined by the Executive Secretary to be a "Bank Travel Department" within the meaning of the Air Traffic Conference Agency Resolution, or
2. the Agent submits to the Executive Secretary annually a current balance sheet, certified by a certified public accountant to present fairly the financial position of the Agent, which establishes that total assets available for satisfaction of debts exceed liabilities by at least $75,000, and the credit rating of the Agent, if published by Dun and Bradstreet or other recognized credit-rating agency, is shown as "good" or higher;

and (c) after the Agent has been on the Air Traffic Conference Agency List for one year, adjustment of the amount of the bond to provide coverage in excess of the $10,000 minimum shall be made at least once a year, and at any other time when the amount of the Agent's bond fails by $2,000 or more to provide adequate coverage. Nothing herein shall be deemed to preclude an agent from reducing the amount of coverage whenever consideration of his sales experience for the most recent twelve consecutive months shows him to be carrying a bond in excess of that herein required.

6. Misrepresentation as to Routing, et cetera:

The Agent shall not make any misrepresentation as to the Carrier, aircraft, or route by which any passenger is to be transported, nor as to any service to be furnished by the Carrier.

7. Securing of Accommodations:

The Agent shall request reservations of accommodations only when the Agent has had a request to do so from a client and, if so required by the Carrier, when a deposit therefor in the proper amount has been paid to the Agent by the client. The Agent shall secure confirmation from the Carrier that a definite reservation has been made before issuance to the client of a ticket or exchange order for any particular flight or flights; except that, unless otherwise instructed by the Carrier, an exchange order may be issued to a client covering "open date" transportation, or a ticket may be so issued which includes an "open date" portion or portions for which no accommodations have been reserved at the time of issuance to the client, provided such forms are properly marked to indicate "open date" issuance in accordance with current instructions of the Carrier.

8. Remuneration—Commission:

As remuneration for the services performed by the Agent hereunder, the Carrier agrees, subject to the limitations set forth in this Agreement, to pay the Agent as commission a percentage (as set forth in Schedule A attached hereto and made a part hereof) of the fares and charges applicable to the air passenger transportation offered by the Carrier which is sold by the Agent hereunder. Such commission shall be accepted by the Agent as full compensation for its services rendered to the Carrier hereunder. No commission will be paid to the Agent for the sale of any air passenger transportation unless (1) such Agent issued a ticket or an exchange order covering the air passenger transportation for the sale of which the commission is paid, and (2) such Agent collected the proper amount of fares and charges applicable to such transportation or procured a properly executed transportation receipt and other documents as required pursuant to the Universal Air Travel Plan.

The Agent shall not be entitled to a commission for the sale of any air passenger transportation, and shall refund any commission previously paid or retained in connection with such sale, unless the passenger is actually transported by the Carrier to a point other than that at which he embarks; except that, where the terms of sale of the transportation provide for a return to the point of embarkation without landing at any other point, the Agent shall be entitled to a commission if the passenger is actually transported in accordance with such terms.

In cases of cancellation by the Agent's client of any portion of the transportation sold by the Agent and for which the Agent has issued a ticket or exchange order supplied by or on behalf of

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of Richard R. Saunders

the Carrier or has drawn an exchange order on the Carrier, the Agent shall not be entitled to a commission for the sale of the portion so cancelled, and shall, on demand of the Carrier, refund any commission previously paid or retained in connection with such sale. Any moneys withheld by the Agent as commissions from remittances dues the Carrier hereunder, pursuant to Paragraph f this Agreement, shall remain the property of the Carrier, and shall be held in trust by the Agent until the transportation to which the commissions relate has been completed.

No commission will be paid to the Agent for the sale of any air passenger transportation for which the Agent issues a ticket (or portion thereof) or exchange order in violation of any provisions of this Agreement.

No commission will be paid to the Agent for the sale of any air passenger transportation, exclusively between points in the Continental United States and/or Canada, which is paid for under the Universal Air Travel Plan; *Provided*, That if such Plan is entered after the sale was made, a commission will be paid on such sale as if no such Plan had been entered into; and *Provided, Further*, That nothing herein shall prohibit payment of commission at the regular tour rate on the tariff fares and charges applicable to the domestic air passenger transportation included in an Advertised Air Tour or Independent Air Tour. No commission will be paid to the Agent for the sale of any air passenger transportation paid for by Government travel voucher, warrant, or similar Government purchase contract.

No commission will be paid to the Agent for the sale of any air passenger transportation for which the Agent issues a ticket or exchange order

(1) to any person who has a financial interest in the Agent, or
(2) to any officer or employee of the Agent, or
(3) to any officer or employee of any entity or person which owns, controls or has a financial interest in the Agent:

Provided, That this subparagraph shall not preclude payment of commission because of a financial interest arising from investment in an Agent which is an entity whose shares are listed on a securities exchange or are regularly traded in an over-the-counter market; and *Provided, Further*, That this subparagraph shall not preclude payment of commission in those cases where an employee of the Agent purchases transportation for his own personal use, e.g., a vacation.

9. Communications:

The Carrier will not accept collect telegrams or telephone calls from the Agent for any purpose, nor will the Carrier assume or pay any telephone, telegraph, mailing, printing or other communications, advertising or promotional expense of the Agent for any purpose. The Carrier will, however, prepay reservation confirmation messages to the Agent.

10. Refunds:

The Agent may refund any fare or charge applicable to air transportation sold by the Agent hereunder and for which the Agent has issued a ticket or exchange order supplied by or on behalf of the Carrier. The Agent, shall make refund only to the person authorized to receive the refund and in accordance with the tariffs, rules, regulations and instructions issued by the Carrier, and shall not assess or withhold from the refund payee any amount as a service charge or otherwise. The Agent hereby agrees to idemnify and hold the Carrier harmless from and against any claim arising from the failure of the Agent to refund promptly to the authorized refund payee the proper amount of fare or other charge. If the amount refundable was collected by the Agent and remitted to the Carrier prior to making the refund, the Carrier shall reimburse the Agent the amount of such refund upon receipt of the Agent's written statement that the refund has been paid.

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Annexed to Affidavit of
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11. Commissions Not to Be Divided:

The Agent shall retain the full amount of the commissions allowed by the Carrier unless an authorized traffic official of the Carrier authorizes the Agent in writing to pay a portion of its commissions to a sub-agent, and such sub-agent is included on the Air Traffic Conference Agency List. The Agent shall not rebate or promise to rebate, directly or indirectly in any manner whatsoever, the commissions or any portion thereof, granted to the Agent by the Carrier, to any passenger or client.

12. Free or Reduced Rate Transportation Furnished to Agent Not Transferable:

The Agent shall not resell or otherwise transfer any ticket or other document entitling him, or any of his officers or employees, to air passenger transportation offered by the Carrier if such ticket or document has been furnished to the Agent without charge or at a reduced rate.

13. Compliance with Tariffs, Rules, Regulations and Instructions:

The Agent shall comply with all instructions of the Carrier, including any specific instructions applying to any particular case or circumstances, and shall make no representation or statement not previously authorized by the Carrier. The Agent shall deliver to the Carrier such specific instructions, requests, or particulars in connection with a client or his transportation as may be proper to enable the Carrier to render efficient service to its passengers. The Agent also agrees to adhere to and to comply with the tariffs, rules, and regulations of the Carriers.

14. Advertising and Publicizing the Carrier's Services:

In carrying out the services specified hereunder and within the limitations hereof, the Agent shall make known the services of the Carrier in every way reasonably practicable. However, samples of all advertising matter to be issued by and at the expense of the Agent, in which reference is made to the Carrier, shall be approved by the Carrier prior to display or distribution thereof.

The Carrier shall furnish the Agent with timetables, schedules of fares, and other information and instructions, including advertising and publicity matter, which the Carrier customarily supplies to its Agents, and the Agent shall make effective use thereof in publicizing the services of the Carrier.

15. Default:

If at any time the Agent is in default to the Carrier or to any other party to the Air Traffic Conference Agency Resolution, the Carrier, at its option, may either terminate this Agreement, as between it and the Agent, by notice in writing to the Agent, such notice to take effect immediately upon its receipt, or may, for such periods as it deems advisable, withdraw its airline identification plate from the Agent and revoke any authorization previously given to the Agent to draw its own exchange orders on the Carrier, and the Secretary-AFAC may, for such periods as he deems advisable, withdraw all Standard Agent's ticket forms and exchange orders supplied to the Agent.

16. Adequate Amount of Business:

The Agent shall endeavor to create and stimulate the sale of air passenger transportation offered by the Carrier, to perform and provide adequate service to the Agent's clients, and to transact a sufficient amount of business to justify the costs and responsibilities incurred by the Carrier in retaining the agency. The failure or inability of the Agent to produce an amount of business sufficient to justify the continuance of the agency may result in its termination at any time by the Carrier.

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Annexed to Affidavit of
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17. Maintenance of Ethical Business Standards:

The Agent shall at all times maintain ethical standards of business in the conduct of the agency and in its dealing with its clients, the public and the Carrier.

18. Liability:

The Carrier hereby agrees to indemnify and hold harmless the Agent, its officers, agents and employees from all responsibility and liability for any damage, expense, or loss to any person or thing caused by or arising from any negligent act or omission of the Carrier, its representatives, agents, employees, or servants, and related directly or indirectly to any transportation sold by the Agent hereunder and performed, or to be performed, by the Carrier. The Agent likewise agrees to indemnify and hold harmless the Carrier, its officers, agents and employees from all responsibility and liability for any damage, expense, or loss to any person or thing caused by or arising from any negligent act, omission, or misrepresentation of the Agent, its representatives, agents, employees, or servants. The Agent further agrees to indemnify and hold harmless the Carrier, its officers, agents and employees, from any and all damage, expense, or loss on account of the loss, misapplication, theft, or forgery of tickets, exchange orders, or other supplies furnished by or on behalf of the Carrier to the Agent, or the proceeds thereof, whether or not such proceeds have been deposited in a bank, and whether or not such loss is occasioned by the insolvency of either a purchaser of such forms or documents or of a bank in which the Agent may have deposited such proceeds, and notwithstanding the fact that, under the terms of this Agreement, such proceeds are the property of the Carrier and held in trust by the Agent.

19. Notices:

All notices to the Agent or to the Carrier shall be sufficient if sent by prepaid telegram or mail, addressed as each party may designate in writing during the term of this Agreement.

20. Agency Fees:

The Agent shall pay to the Executive Secretary of the Air Traffic Conference of America, on or before January 10 of each year, an annual fee in the amount prescribed by the said Conference for each place of business designated by any party to the Air Traffic Conference Agency Resolution as provided in Paragraph 2 of this Agreement.

The Agent shall pay to the said Executive Secretary, upon execution of this Agreement, an initial fee which bears the same relation to the amount of the annual fee payable hereunder as the portion of the calendar year remaining after the date of the announcement by the Executive Secretary of the receipt of the Agent's application bears to a full calendar year: *Provided*, That if this Agreement is executed during the month of December, no such initial fee shall be payable.

In the event of termination of this Agreement as between the Agent and each party to the Air Traffic Conference Agency Resolution which has delivered a Certificate of Appointment to the Agent, the last fee paid by the Agent under this Agreement shall be prorated as of the date of such termination and the portion applicable to the period after such termination will be refunded to the Agent.

In the event the designation of any place of business is terminated by all parties to the Air Traffic Conference Agency Resolution which have designated such place of business as provided in Paragraph 2 hereof, the portion of the fee last paid by the Agent attributable to such place of business shall be prorated on the same basis, and an appropriate refund made to the Agent.

21. Agency Bond:

The Agent shall be acceptable to the bonding company for coverage under such bond, and for such amount, as may be required by the Agency Committee of the Air Traffic Conference of

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America. Failure to so qualify shall immediately terminate this Agreement as between the Agent and all parties to the Air Traffic Conference Agency Resolution.

22. Transfer, Assignment, or Change of Name or Address:

The name or names under which the activities of the Agent are conducted, or under which any of its offices are operated, shall be only such as are set forth in this Agreement, and such name or names shall not be changed except upon thirty (30) days advance written notice to the Executive Secretary of the Air Traffic Conference: *Provided*, That if within such thirty (30) days period the Executive Secretary notifies the Agent that the proposed name or names would violate Paragraph 3 of this Agreement, the change of name shall not be made.

The location of any place of business covered by this Agreement shall not be changed except upon thirty (30) days advance written notice to the Executive Secretary of the Air Traffic Conference, accompanied by evidence, satisfactory to the Executive Secretary, the new location qualifies under the terms of the ATC Agency Resolution: *Provided*, That if within such thirty (30) day period the Executive Secretary notifies the Agent that such evidence is not satisfactory, the Agent may nevertheless change the location subject to determination by the ATC Agency Committee at its next regular meeting, as to whether the location is qualified.

This Agreement shall not be assignable or otherwise transferable by the Agent except with the consent of the ATC Agency Committee, provided that temporary consent to the assignment or transfer, pending action by the Committee, may be given by the Executive Secretary of the Air Traffic Conference upon receipt of an application, in a form prescribed by the ATC Agency Committee, setting forth information with respect to the assignee or transferee, his financial status, and other matters bearing on his qualifications.

With respect to any place of business, covered by this Agreement, which is located in Canada, the written notice of change of name or location, pursuant to the frst two subparagraphs of this paragraph, or the application for transfer or assignment, pursuant to the third subparagraph of this paragraph, shall be submitted to the Executive Secretary through a Carrier.

23. Other Agreements Superseded:

This Agreement shall supersede any and all prior agreements between the Agent and any party to the Air Traffic Conference Agency Resolution concerning the sale of air passenger transportation offered by any such party, except with respect to rights and liabilities existing at the date hereof.

24. Termination:

This Agreement may be terminated as between the Agent and the Carrier, at any time by notice in writing from either to the other, such notice to take effect immediately upon its receipt, subject to the fulfillment by each of all obligations accrued prior to the receipt of such notice. This Agreement may be terminated as between the Agent and all parties to the Air Traffic Conference Agency Resolution, at any time by notice in writing from the Agent to the Executive Secretary of the Air Traffic Conference of America, or from the Executive Secretary of the said Conference (or his authorized representative) to the Agent, such notice to take effect immediately upon its receipt, subject to the fulfillment, by the Agent, and by each party to the said Resolution which has delivered a Certificate of Appointment to the Agent of all obligations accrued prior to the receipt of such notice. Upon termination of this Agreement as between the Agent and the Carrier, the airline identification plate shall immediately be returned to the Carrier, together with all moneys due and payable to the Carrier hereunder, and a complete and satisfactory accounting rendered. Upon termination of this Agreement as between the Agent and parties to the Air Traffic Conference Agency Resolution, all unused Standard Agent's ticket forms and exchange orders shall immediately be returned to the Secretary-AFAC and all airline identification plates shall immediately be re-

turned to the Carrier, together with all moneys due and payable to the Carrier hereunder, and a complete and satisfactory accounting rendered.

25. Rights, etc. of Air Carriers Several:

The rights, powers, privileges, immunities, and duties under this Agreement, of the air carriers which are parties to the Air Traffic Conference Agency Resolution shall be several and not joint.

26. Subject to Carrier's Obligations, etc., under Air Traffic Conference Agency Resolution:

The Agent recognizes that the Carrier is party to the Air Traffic Conference Agency Resolution and as such is entitled to certain rights and is subject to certain obligations under the provisions of said Resolution. The Agent further recognizes that this Agreement is entered into for an indefinite period and that it may be terminated at any time by the Carrier, as provided in Paragraph 24 hereof, for any reason which is deemed sufficient by the Carrier, and that the Carrier is under no obligation to justify such termination. The Agent agrees that this Agreement and the rights and obligations of the parties hereto are subject to the said Air Traffic Conference Agency Resolution and the rights and obligations of the Carrier thereunder, and that the Agent shall have no recourse against the Carrier, or the Air Traffic Conference of America, or any member of the Air Traffic Conference of America, or against any officer, employee, agent or servant of any of them, by reason of any action taken in accordance with the provisions of the said Resolution, or by any reason of any termination of this Agreement in accordance with its provisions.

27. Arbitration: (Not applicable in Canada)

Any claim or controversy arising out of, or relating to, termination of this Agreement by reason of action of the Agency Committee of the Air Traffic Conference of America under Paragraph I of Section IV of the Conference's Agency Resolution shall be settled by arbitration on the following terms and conditions:

a. *Selection of Arbiters:* Within 15 days after receipt by Agent of notice from the Executive Secretary of the Air Traffic Conference that he has been removed from the Agency List, and this Agreement accordingly terminated, the Agent shall notify the Executive Secretary by registered mail if he desires to have such removal reviewed by an arbitral tribunal and shall, at the same time, name one arbiter acceptable to the Agent. Such notice shall enclose the amount of $100.00 as a deposit toward the Agent's share of the expenses of arbitration. Within 10 days after receipt of such notice from Agent, the Executive Secretary shall name an arbiter acceptable to the Executive Secretary, notifying Agent by registered mail of the person so selected. Within 20 days after mailing of such notice by the Executive Secretary, the two arbiters so selected shall designate a third, who shall serve as chairman of the tribunal. If such third arbiter shall not have been designated within 90 days after date of mailing by the Executive Secretary of notice that the Agent has been removed, such third arbiter shall be designated by the American Arbitration Association.

b. *Conduct of Proceedings:* The tribunal so selected shall set the matter down for hearing not later than 30 days after selection of the chairman and shall notify the Executive Secretary and the Agent of the time and place of such hearing by registered mail: *Provided*, That at the request of the Agent the date of hearing may be postponed until after the next meeting of the Committee so as to permit it to reconsider his removal from the Agency List. In the conduct of proceedings before the tribunal, the rules and procedures of the American Arbitration Association, insofar as they are applicable, and not in conflict with Civil Aeronautics Board Order No. E-14012, June 10, 1959, shall govern. The decision of a majority of the arbiters shall be final and binding upon the Agent and the parties

"EXHIBIT A"
Annexed to Affidavit of
Richard R. Saunders

to the Air Traffic Conference Agency Resolution. The expenses of arbitration, including any fees payable to the arbiters, shall be shared equally by the Agent and the Conference.

c. *Scope of Arbitral Tribunal's Review:* The arbitral tribunal shall receive any probative evidence bearing on the qualifications of the Agent, shall determine whether the evidence demonstrates the Agent to be qualified or unqualified for retention on the Agency List, and shall direct action upon the application accordingly.

d. *Status Pending Arbitration:* Upon or prior to notifying the Executive Secretary that he he demands arbitration, the Agent shall surrender the airline identification plates to each party to the Air Traffic Conference Agency Resolution and to the Secretary-AFAC all Standard Agent's ticket forms and exchange orders supplied to the Agent, unless he posts with the Executive Secretary a bond (or a supplement to any pre-existing bond furnished under Paragraph 5A hereof), in an amount not less than the Agent's highest sales of air transportation commissionable hereunder in any one of the 12 preceding calendar months, expressly conditioned upon remittance in full, less applicable commission, during the pendency of arbitration, and upon holding harmless each carrier from any liability it might incur to Agent's customers by reason of Agent's failure to deliver tickets paid for, or refund payments made, during the pendency of arbitration. During the pendency of such arbitration, Agent may continue to sell air transportation in accordance with the terms and conditions of this Agreement. If the Agent posts the bond hereinabove referred to, the Secretary-AFAC shall continue to supply Agent with Standard Agent's ticket forms and exchange orders, and each Carrier which had supplied the Agent with airline identification plates prior to cancellation shall continue to supply him with such plates, and said remittance shall be made in accordance with the procedures prescribed in Paragraph 5 hereof. If the Agent does not post said bond, remittance shall be made in full, without deduction of commissions, for such transportation prior to or upon the issuance of tickets, through the use of envelope-type Air Transportation Exchange Orders or such other arrangements as may be agreed upon, and, if the arbitral tribunal directs reinstatement of Agent, or if the Agency Committee of the Conference reinstates such Agent prior to issuance of the arbiters' decision, he shall be entitled to, and each Carrier shall promptly remit to him, commissions at the rates set forth herein for transportation sold by him during the pendency of arbitration, but in no other circumstances shall Agent be entitled to, or receive, commissions from any such Carrier for transportation sold during the pendency of arbitration.

28. Waiver of Libel by Reason of Notice of Reasons for Review or Removal from Agency List

The Agent recognizes that the Agency Committee of the Air Traffic Conference has been directed by the Civil Aeronautics Board, in its Order No. E–14012, June 10, 1959, to record and give notice to the Agent of its reasons for disapproving the Agent in the event it determines, after review of his eligibility, to remove him from the Agency List, and also to give Agents upon whom review is requested for violations or other charges notice thereof. The Agent hereby expressly waives any and all claims, causes of action, or rights to recovery based upon libel, slander or defamation of character by reason of such publication of asserted grounds or reasons for removal from the Agency List, or of alleged violations or other charges for which review of the Agent's eligibility is requested, as is reasonably related to the performance of appropriate functions specified in applicable Air Traffic Conference Resolutions.

"EXHIBIT A"
Annexed to Affidavit of
Richard R. Saunders

SCHEDULE A

RATES OF COMMISSION

1. For the sale of any Advertised Air Tour, ten percent (10%) of the tariff fares and charges applicable to the domestic air passenger transportation offered by the Carrier included in such tour; *Provided*, That prior to the date on which such Tour is offered for sale to the public, such Tour has been filed with and approved by the party to the Air Traffic Conference Agency Resolution pursuant to said Resolution as it may be amended from time to time.

2. For the sale of any Independent Air Tour, ten percent (10%) of the tariff fares and charges applicable to the domestic air passenger transportation offered by the Carrier included in such Tour; Provided, That—

(a) The Agent has established to the satisfaction of the Carrier (i) that he has, by advertising and other promotion, made substantial efforts to promote the sale of Independent or Advertised Air Tours; and (ii) that he has regularly advertised and demonstrated his ability and willingness to arrange and sell, Independent or Advertised Air Tours;

(b) The Agent has filed with the Carrier an Agent's Air Tour Report on forms supplied by the Carrier; and

(c) All passenger tickets and/or exchange orders are marked with the code "IT".

3. For the sale of any Incentive Air Tour, ten percent (10%) of the tariff fares and charges applicable to the domestic air passenger transportation offered by the Carrier included in such Tour; *Provided*, That—

(a) The Agent has established to the satisfaction of the Carrier (i) that he has, by advertising and other promotion, made substantial efforts to promote the sale of Incentive Air Tours; and (ii) that he has regularly advertised and demonstrated his ability and willingness to arrange and sell, Incentive Air Tours;

(b) The Agent has filed with the Carrier an Agent's Air Tour Report on forms supplied by the Carrier, together with promotional literature, supported by a statement that the transportation sold "was offered as a prize"; and

(c) All passenger tickets and/or exchange orders are marked with the code "IT".

4. For the sale of any through ticket covering air passenger transportation between a point within the Continental United States or Canada and a point outside of either such area, or between two points (other than points in Hawaii) outside of either such area, which is not included in an Independent, Advertised, or Incentive Air Tour, seven percent (7%) of the tariff fares and charges applicable to the domestic air passenger transportation offered by the carrier covered by such ticket.

5. For the sale of any charter flight to be operated by the Carrier, five percent (5%) on the actual transportation mileage charges only (or on minimum tariff charges assessed in lieu of such transportation mileage charges), and not on any ferry mileage charges, landing charges, layover charges, or other accessorial charges involved in the computation of the total charter rate.

6. For the sale of any other domestic air passenger transportation offered by the Carrier, five percent (5%) of the tariff fares and charges applicable to such transportation: *Provided*, That the commission payable for the sale of any transportation on a sightseeing flight only shall not be less than twenty-five cents (25¢) per passenger.

BEST COPY AVAILABLE

"EXHIBIT B" ANNEXED TO AFFIDAVIT OF RICHARD R. SAUNDERS

CN10-10M-11-73

MEMORANDUM

SUPREME COURT, NASSAU COUNTY SPECIAL TERM, PART III (Index #8740/74)

JOSEPH F. HINTERSHIRE, as Treasurer of the Air Transport Association of America, etc., et al, Plaintiffs,

Vs.

NORTH SHORE TRAVEL SERVICE, INC., Defendant.

BY DI PAOLA J.

DATED July 26, 1974

E

CHADBOURNE, PARKE, WHITESIDE & WOLFF, Esqs.
Attorneys for Plaintiffs
30 Rockefeller Plaza
New York, N.Y. 10020
By: John N. Romans, Esq.

PATRICK F. BRODERICK, Esq.
Attorney for Defendant
38-08 Bell Boulevard
Bayside, New York

Plaintiffs herein seek to recover possession of airline ticket stock and related paraphernalia held by defendant pursuant to an agreement between the parties. Defendant, in addition to denying all of the allegations of the amended complaint, counterclaims for damages allegedly incurred as the result of plaintiffs' wilful, intentional and malicious conduct in seeking an order to show cause and the breach of alleged fiduciary relationship, and by the operation of the restraining provisions of the order to show cause.

The agreement between the parties provided that upon the defendant being charged with four violations thereunder within a twelve month period, the plaintiffs could elect to suspend the agency and recover all ticket stock and related paraphernalia provided to defendant. The plaintiffs, as a basis of exercising their prerogative, relied on a late filing of the February 20, 1974 report, payment of the sums due under the April 30, 1974 report with a dishonored check that was subsequently covered with wired

funds within the time frame allowed in the agreement, and the payment of sums due on filing of the report due May 31, 1971 with a check that was dishonored and not covered within the time frame allowed. It is further claimed that the February 20th and April 30th incidents resulted in a single violation for each report and the May 31st report resulted in two violations, thereby totaling four violations which would give rise to plaintiffs' right to suspend the defendant.

The evidence submitted is not persuasive that the defendant did not abide with its obligations in connection with the February 20, 1974 report. It is equally inferrable that non-delivery was the result of postal service delivery failure or failure of the area bank to properly receive and credit the communication of the report.

There is convincing proof that the defendant did violate the terms of their agreement with respect to the reports that were due for the periods ending April 30, 1974 and May 31, 1974, the latter incident involving two violations. The defendant is, therefore, chargeable with three violations, the first commencing April 30, 1974. This is one less than is required to sustain a suspension. The complaint must, therefore, be dismissed.

With reference to the counterclaims, the defendant has failed to establish that the plaintiffs acted in a wilful, intentional and malicious manner. It has likewise failed to establish a fiduciary relationship between the parties that would have required the plaintiffs to have first notified the defendant of its intention to sue or any requirement that would compel the plaintiff to consult with or accept any representations of the defendant before commencing suit. Moreover, it proved no damages. The counterclaims are, therefore, dismissed.

ANDREW J. DIPAOLA
J.S.C.

Submit judgment.

"EXHIBIT C" ANNEXED TO AFFIDAVIT OF RICHARD R. SAUNDERS

"OPINION OF JUDGE LYNDE"

11660-15-1

CN10-10M.9-68

MEMORANDUM

SUPREME COURT. NASSAU COUNTY

SPECIAL TERM PART III

BY LYNDE J.

DATED

INDEX #10002/74
CAL # S 6231 (10/30/74)

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association; xxxx PAUL R. IGNATIUS, as President of the Air Transport Association of America; ~~GEORGE A. BUCHANAN, as Executive~~ Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; and WILLIAM M. HAWKINS, JR., as Executive Secretary of the Airline Finance and Accounting Conference, a Division of the Air Transport Association of America,

Plaintiffs,

vs

NORTH SHORE TRAVEL SERVICE, INC.,

Defendant,

and CHRISTENSEN A. FLEIG, MARIE H. LAMORELL and HEMPSTEAD BANK,

Additional Defendants on claims.

CHADBOURNE, PARKE, WHITESIDE & WOLFF, ESQS.
Attorneys for Plaintiffs
30 Rockefeller Plaza
New York, New York 10020

PATRICK F. BRODERICK, ESQ.
Attorney for Defendant
NORTH SHORE TRAVEL SERVICE, INC.
38-08 Bell Boulevard
Bayside, New York 11361

DALTON & HENOCH, ESQS.
Attorneys for Additional Defendants
50 Clinton Street
Hempstead, New York 11550

Plaintiffs instituted this action pursuant to CPLR Section 7101 to recover possession of airline ticket stock and related documents and material held by the defendant, North Shore Travel Service, Inc., pursuant to a contractual understanding; the ticket stock and related material is presently in the custody of the Sheriff of Nassau County pursuant to an Order of Seizure.

"EXHIBIT C" ANNEXED TO AFFIDAVIT OF RICHARD R. SAUNDERS.

Plaintiffs are officers of the Air Transport Association of America (ATA), an unincorporated association, whose members consist of the scheduled United States air carriers, known as the Air Traffic Conference of America (ATC), a division of the ATA, which is responsible for the administration of the relationship between the member airlines and travel agents, and the Airline Finance and Accounting Conference (AFAC); AFAC is a division of the ATA which is responsible, in cooperation with ATC, for the administration of the relationship between the member air carriers and travel agents.

The defendant, North Shore Travel Service, Inc., as a travel agent, has been a member of ATC since September 20, 1961.

On September 20, 1961, North Shore entered into a Sales Agency Agreement with ATC; on October 1, 1965, North Shore entered into a revised Sales Agency Agreement with ATC; subsequently, North Shore executed various amendments to that Agreement; all agreements entered into between the parties were in standard form and approved by the Civil Aeronautics Board.

Pursuant to the terms of the Agreement, North Shore was approved as a travel agent subject to the terms and conditions of the Agreement; North Shore was supplied with the ticket stock and related material which are the subject matter of this action.

The Agreement provides that the ticket stock and related material are to be held by North Shore in a fiduciary capacity and surrendered to plaintiffs on demand. The Agreement required North Shore to report all sales of air transportation and remit the proceeds therefrom three times each month within a specified time period.

The Agreement incorporates, by reference, the Air Traffic Conference Agency Resolution. Section VII. C. of the Air Traffic Conference Agency Resolution 80.10, sets forth the violation criteria of said Agreement.

"EXHIBIT C" ANNEXED TO AFFIDAVIT OF RICHARD R. SAUNDERS.

A remittance check dishonored by the drawee bank constitutes two violations. A dishonored check covered by wired funds within a certain time constitutes one violation as does a late remittance.

If an agent accumulates four violations within a 12-month period, that agent is automatically suspended and ATC is required to pick up the ticket stock and related material.

The agent may obtain reinstatement in a summary reinstatement procedure known as the mail vote. The mail vote is instituted by the agent. If within 15 days after notice of the agent's suspension, no member carrier requests that the agent be held for review by the Agency Committee, the agent is reinstated. However, if a member carrier so requests, the agent must be reviewed by the full Agency Committee at its next meeting.

In July, 1974, at Special Term Part III of this Court, before the hon. Andrew DiPaola, an action was instituted by the plaintiff, as in the instant case, to recover possession of North Shore's airline ticket stock and related material based on a breach of the underlying agreement. Plaintiffs charge North Shore with a violation based on four late remittances within a 12-month period. One violation in connection with payment of sums due pursuant to the April 30, 1974 report with a dishonored check subsequently covered with wired funds within the time allowed in the agreement; what was tantamount to two violations, by payment of sums due under the May 31, 1974 report with a check that was dishonored and not covered within the time allowed.

In a decision which was rendered on July 26, 1974, Justice DiPaola held that there was a valid agreement in force and effect between the parties and that North Shore had violated the agreement in connection with the April 30, 1974 and May 31, 1974 report periods. With respect to said violations, Justice DiPaola's decision stated:

"EXHIBIT C" ANNEXED TO AFFIDAVIT OF RICHARD R. SAUNDERS.

"There is convincing proof that the defendant did violate the terms of the agreement with respect to the reports that were due for the periods ending April 30, 1974 and May 31, 1974; the latter incident involving two violations. The defendant is, therefore, chargeable with three violations, the first commencing April 30, 1974. This is one less than is required to sustain a suspension."

It is this Court's decision that Justice DiPaola's ruling that the defendant is chargeable with three violations in connection with the April 30, 1974 and May 31, 1974 report period is res judicata as to the rights and liabilities of the respective parties pursuant to the terms and provisions of the underlying agreement for the report periods involved. (Israel v Wood Dolson Co., 1 NY 2d 116, 118-9 (1950); New York State Labor Relations Board v Holland Laundry, Inc., 294 NY 480, 493-94 (1945)).

Consequently, the only issue for this Court to resolve is whether North Shore's check for the pay period ending July 10, 1974 was dishonored and constitutes two late remittances. The outcome of the ancillary issues rest on this determination.

Plaintiffs allege that the three late remittances found by Justice DiPaola combined with the two late remittances for the July 10, 1974 pay period constitute five late remittances within a twelve month period; based on that assumption, ATC advised North Shore that it was suspended and should cease selling air transportation; demand was then made that North Shore return all ticket stock and related supplies.

It is the Court's decision that the check issued for the July 10, 1974 pay period was dishonored and constituted two late remittances; these two late remittances combined with the three late remittances determined by Justice DiPaola's decision of July 26, 1974, total an accumulated five within a consecutive twelve month period.

It should be noted at this point that after its ticket stock was

seized by the Sheriff, North Shore, pursuant to Paragraph VII. C. of ATC Resolution 80.10, incorporated in the agreement by reference, applied for summary reinstatement by a process known as a mail vote. Pursuant to the agreement, North Shore submitted a written explanation of the reasons for each violation in a letter dated August 2, 1974; the letter was circulated by the plaintiffs to its members; pursuant to the agreement, one of the members, American Airlines, requested that North Shore's reinstatement be held off under paragraph VII. C.; as a result of American Airline's request, North Shore's reinstatement, in accordance with the agreement, was held over for review by the Agency Committee at its next meeting.

North Shore's defense is that the defendant Hempstead Bank wrongfully dishonored the check of July 15, 1974. The credible evidence adduced by the Hempstead Bank permits this Court to conclude that North Shore, in June and July of 1974 did not have sufficient collected funds in its account and the Bank acted properly in returning the checks unpaid. Furthermore, there existed no valid agreement requiring the Bank to pay such checks against insufficient or uncollected funds.

On June 11, 1974, Hempstead Bank received, through the check clearing process, a check drawn by North Shore payable to ATC in the amount of $16,069.18; had the Bank paid that check, the balance in the account would have been overdrawn by $4,785.00; the Bank did not pay the check; on July 18, 1974, the Hempstead Bank received for payment a check drawn by North Shore payable to ATC in the amount of $16,914.40; had the Bank paid that check, the balance in the account would have been overdrawn by $5,430.00; the evidence is uncontroverted that on these particular dates, North Shore did not have sufficient collected funds in its account to enable the Bank to pay these two checks. Further, the Bank never agreed to pay overdrafts.

"EXHIBIT C" ANNEXED TO AFFIDAVIT OF RICHARD R. SAUNDERS.

Automatic suspension of North Shore by ATC, pursuant to the terms of the agreement between the parties, was justified and legally proper.

It is the decision of this Court that the affirmative defense and counterclaims asserted by North Shore are dismissed accordingly.

The present action was started on July 30, 1974; subsequently, pursuant to an Order to Show Cause, Justice Burstein signed an Order of Seizure directing the Sheriff to seize the airline ticket stock and related material and to hold said chattels "pending the trial of this action."

Further, that plaintiffs are entitled to possession of the chattels under the terms of their agreement with North Shore in that North Shore has accumulated five late remittances during 1974 (CPLR 7101; Pennbeaver Corp. v Robinson, 68 Misc. 2d 448, 326 NYS 2d 694 (Sup. Ct. Nassau Co. (1971); 7A Weinstein-Korn-Miller, N.Y.Civ.Prac., Par. 7101.03).

This is the decision of this Court pursuant to CPLR 4213(b).

Settle judgment on notice.

_____

J.S.C.

"EXHIBIT D" ANNEXED TO AFFIDAVIT OF RICHARD R. SAUNDERS.

Air Traffic Conference of America

A Division of Air Transport Association of America

1709 New York Avenue, N.W. • Washington, D. C. 20006

AGENCY DIVISION

Phone (202) 872-4076

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

August 7, 1974

NORTH SHORE TRAVEL SERVICE, INC.
40 Underhill Boulevard
Syosset, New York 11791

Re: Insurance Company of North America
Bond No. 322800

Gentlemen:

This is to inform you that we have received notice from the above surety that the bond issued on behalf of your agency will be cancelled effective on and after 8/29/74

Please be advised that unless the aforementioned bond is reinstated or replaced, in the proper form and amount, prior to the effective date of its cancellation, we shall have no alternative but to terminate your Sales Agency Agreement for non-compliance with Paragraph 5.A thereof.

Accordingly, in order to avoid the termination of your Agreement, it is extremely important that you take immediate steps to arrange to have an acceptable replacement bond in our hands prior to the aforementioned cancellation date.

Your prompt action is urged!

Sincerely,

Charles H. Wolff
Manager, Agency Administration

CHW/pr

"EXHIBIT E" ANNEXED TO AFFIDAVIT OF RICHARD R. SAUNDERS.

Air Traffic Conference of America

A Division of Air Transport Association of America

1709 New York Avenue, N.W. • Washington, D. C. 20006 • Phone (202) 872-4000

October 11, 1974

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Frank J. Monello
North Shore Travel Service, Inc.
40 Underhill Boulevard
Syosset, New York 11791

Dear Mr. Monello:

This is with reference to your letter of October 2, 1974, concerning an outstanding balance due North Shore Travel Service, Inc. in the amount of $7,082.90.

In reviewing this matter, it has been brought to our attention that your agency has failed to respond to numerous debit memoranda covering commission recalls and remittance shortages which have been sent to you by various airlines over the past several months. Some unpaid debit memoranda go as far back as 1972. Based upon initial figures provided to us by a few carriers, these debit memoranda total at least $8,399.19. However, our figures are not yet complete and do not include such carriers as American Airlines which, we understand, has outstanding debit memoranda against your agency in excess of $5,000.00. Under the circumstances, we shall hold the question of your refund in abeyance until a final audit has been made, at which time the amount due your agency shall be duly credited in determining our claim against your surety.

With regard to your surety, I note that your ATC bond was cancelled by INA effective August 29, 1974. As Mr. Charles Wolff of this office pointed out to you in his certified letter of August 7, 1974, and in view of the fact that a replacement bond has not been received, your ATC Sales Agency Agreement was terminated effective August 29 for failure to comply with Paragraph 5.A therefore. Accordingly, as you undoubtedly have

"EXHIBIT E" ANNEXED TO AFFIDAVIT OF RICHARD R. SAUNDERS.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

North Shore Travel Service, Inc.
October 11, 1974
Page Two

recognized, your agency has been withdrawn from the agenda of the ATC Agency Committee for review at its December 2-6, 1974 meeting.

As aforesaid, we shall proceed with our claim against your surety as soon as appropriate documentation has been received from all carriers.

Very truly yours,

Richard R. Saunders
Director - Agencies

RRS:scb

bcc: John Romans, Esquire

AFFIDAVIT OF JOHN N. ROMANS IN SUPPORT OF MOTION TO DISMISS.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

- x

NORTH SHORE TRAVEL SERVICE, INC., :

Plaintiff, :

-against- : 76 Civ. 538 (JM)

JOSEPH F. HINTERSEHR, etc., et al., : AFFIDAVIT OF JOHN N. ROMANS IN SUPPORT OF

Defendants. : MOTION TO DISMISS

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN N. ROMANS, being duly sworn, deposes and says:

1. I am associated with the firm of Chadbourne, Parke, Whiteside & Wolff, attorneys for defendants. I am fully familiar with the facts of this action and make this affidavit in support of defendants' motion to dismiss the complaint or in the alternative for summary judgment.

2. The affidavit of Richard R. Saunders, Director-Agencies of the Air Traffic Conference of America ("ATC"), has described the relationship between North Shore Travel Service, Inc., ("North Shore") and ATC and the defendant airlines; the Air Traffic Conference Sales Agency Agreement, ("Agency Agreement"); North Shore's failure to live up to the terms of the Agency Agreement; and the two trials in the New York State courts.

AFFIDAVIT OF JOHN N. ROMANS IN SUPPORT OF MOTION.

3. Following the unanimous affirmance of the trial court's decision (Saunders aff. Ex. C), by the Appellate Division, Second Department, (Exhibit A annexed), the New York Court of Appeals on May 6, 1976, dismissed North Shore's appeal, "sua sponte, on the ground that no substantial constitutional question is directly involved." (Exhibit B annexed).

North Shore's Contentions Have Already Been Litigated

4. Just as it has before this Court, North Shore contended in the trial court below and on appeal before the Appellate Division as follows:

a) The check for the July 10 reporting period (dated July 15, 1974) was returned "under suspicious circumstances," or "unduly rushed to New York." (Complaint ¶22,35, Brief 2,4,26 Tr. 100, 146 & 147),*

b) American Airlines' request that North Shore not be reinstated pursuant to the mail vote procedure was not made within the 15 day period and not made upon reasonable grounds. (Complaint ¶24, Brief 5, 27, Tr. 130-131);

c) There was "a deliberate conspiracy between the ATC, its counsel and the [B]ank's employees to damage Plaintiff's standing . . ." (Complaint ¶37, Brief 2, First and Sixth counterclaims of North Shore in second State court action annexed as Exhibit E);

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* References to "Complaint" are to North Shore's complaint in this Court; to "Brief" to North Shore's brief in the Appellate Division, referenced pages of which are annexed as Exhibit C; and to "Tr" to the transcript of the second trial, referenced pages of which are annexed as Exhibit D.

AFFIDAVIT OF JOHN N. ROMANS IN SUPPORT OF MOTION.

d) The Supreme Court did not make specific findings on these facts as directed by CPLR 4213(b) (Complaint ¶38, Brief 31); and

e) ATC fixed a ridiculously high value on the airline tickets to prevent North Shore from reclaiming the materials seized. Section 7102 of the New York Civil Practice Law and Rules requiring a person seeking to replevy a chattel to post a bond "not less than twice the value of the chattel stated in plaintiff's affidavit," and section 7103 requiring a similar bond to be posted by a person reclaiming that chattel are, alleges North Shore, unconstitutional (Complaint ¶42, 43, Brief 27, Tr. 103, 104, 108).

5. These issues were fully litigated below and finally determined against North Shore. North Shore's appeal to the Appellate Division resulted in a unanimous affirmance of the trial court's decision. The New York Court of Appeals dismissed North Shore's purported appeal of right based on the same "constitutional" argument presented to this Court.

6. North Shore's complaint, therefore, should be dismissed.

John N. Romans

Sworn to before me this
14th day of May, 1976.

Eloise L. Tummina
Notary Public

ELOISE L. TUMMINIA
Notary Public, State of New York
No. 43-4621857
Qual. in N. Y. & Richmond Counties
Commission Expires March 30, 1977

"EXHIBIT A" ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

NEW YORK LAW JOURNAL - Wed. February 4, 1976

HINTERSEHR, res, v. NORTH SHORE TRAVEL SERVICE, INC., ap — Two judgments of the Supreme Court, Nassau County, entered March 26, 1975 and April 18, 1975, respectively, and an order of the same court, entered Sept. 17, 1974, affirmed, without costs or disbursements.

In our opinion, appellant's claims at the trial, and its contentions on appeal, were founded on suspicion and not on evidence. Further, the method of valuation of the ticket stock was rational, objective and for appellant's benefit.

We have examined appellant's other contentions and find them to be without merit.

"EXHIBIT B" ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth *day of* May *A. D.* 1976

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

2 Mo. No. 485 SSD 35
Joseph F. Hintersehr, et al.,
Respondents,
vs.
North Shore Travel Service, Inc.,
Appellant,
and
Christensen A. Fleig, et al.,
Additional Defendants on Claims
Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

"EXHIBIT C" - PAGES FROM BRIEF - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

STATEMENT

The action was against the defendant Travel agent to suspend its charter because of the alleged return of a check in violation of contract. The Travel Agent showed that the check should never have been returned and that the entire law-suit came into being because plaintiff's counsel had told defendant's officer he was going to put his firm out of business.

The check was returned as part of a conspiracy to put defendant out of business and defendant cross-complained against the bank and its employees who were part of the conspiracy.

The court found against defendant but its opinion avoided the real facts in issue and was based on conclusions only.

The action started with a seizure of all tickets and validating stamps by a writ of replevin which effectively put the defendant out of business before the trial in violation of defendant's rights under the Fourteenth Amendment.

PLAINTIFF'S TESTIMONY

Richard R. Saunders testified that he is the director of the Air Transport Association of America (15). This is a section within the Air Traffic Conference which generally administers the industry travel agency program on behalf of the airline members of ATC which are comprised of the domestic U.S. Certified air carriers. That he administrates an agreement between the air carriers and some 10,000 travel agents in the United States (16). The contract was admitted into evidence over objection as Exhibit I (18, 19). Exhibit 2 was marked into evidence as an incorporation of Exhibit I although defendants objected to same and no legal proof of mailing was testified to (22-26). Over objection plaintiffs' Exhibit 3, was admitted into evidence, which was claimed to be an amendment to the Air Traffic Conference Sales Agency Agreement (26-29). Other amendments were admitted into evidence as exhibit 4 (over objection)

"EXHIBIT C" - PAGES FROM BRIEF - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

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Objection kept from the record the telegram dated February 27, 1973 which notified defendant it was in default for four late remittances along with letters from Robert Brisendine and Mr. Robert Dilworth (court refused to allow this correspondence to be marked for identification) (Telegram marked Exhibit C for identification) (78-84). Court refused to hear argument that these exhibits were an integral part of the defense (84-85). That exhibit 11 shows a bank stamp dated July 17, 1974 (98). That there were 2 such dates and counsel claimed that the black was for the Federal Reserve bank and the blue was for the New England Merchants Bank (99). That he never directed anyone of New England Merchants Bank to hand-deliver North Shore Travel's check to the Federal Reserve bank in New York. It was *not* within his recollection that his attorneys directed this hand delivery (100). He admitted that the check did not bear any stamp for the Federal Reserve bank in Boston (101). That the day he signed the affidavit the stock at North Shore Travel had a value of $456,598. This was computed by the sales report of defendant multiplied by the inventory or the number of tickets believed to be on hand (102). He did not know how many tickets North Shore had on hand (102, 103). He admitted that the travel agency tickets are blank pieces of paper and are useless unless written in and therefore they had no value. He denied that the figure of $452,000 was arbitrarily used because he knew that no travel agency could meet the bond of $900,000 that he posted when he issued the order to show cause (102, 104). He was unaware of the average value of the tickets or as to the number of tickets in the possession of North Shore (106). By using records of Mr. Peters and his staff he arrived at the value by the average value per ticket multiplied by the number of tickets on hand in the travel agency (108, 109). Mr. Peters drew the conclusion of $175.48 per ticket that was multiplied by the number of tickets on hand. The information was obtained from the records in Washington. He did not know the number of tickets seized from North Shore Travel. He thinks some 1,900 tickets were seized and that the figure of 456 was definitively wrong (109-111).

"EXHIBIT C" - PAGES FROM BRIEF - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

That he was notified on July 24th that a check received by New England Merchants Bank in Boston had been unpaid (113). He again admitted that when a check is returned and an error is committed, on occasion they have withdrawn their late charges of a late remittance (118). That they had nothing in writing concerning that practice. It is their interpretation or discretion tempered over the years (118). That they would listen very quickly and would be very sympathetic to a travel agency in case of a fire, possible burglary, postal strike or bankruptcy of a bank (119). They have removed the late charge under certain situations of error such as where a bank has made an error in refusing to honor a travel agency's check (120).

That after the stock of a travel agency has been seized based upon four late remittances, it may request a return of tickets through a mail vote procedure. The agency must submit a request and give reasons for the charges and what can be done to avoid recurrences and request that the tickets be reinstated. Notice is then mailed to all the airlines and they are allowed 15 days to reply and if no airline asks that the matter be held over for review, the stock is returned at the next meeting of the agency committee. That North Shore submitted such a request (123). The letter was received on August 5, 1974 but defendant was not reinstated because one of the members sent a request that the agent not be reinstated at that time (124). The Court sustained an objection to the letter of defendant (Exhibit H), solely upon the objection of Hempstead Bank's Counsel (125-127). Telegram was marked Exhibit I (127). The objection was received on August 20, 1974 at approximately 4:49 P.M. Although the original request was dated August 5th the 15 days would not be up until August 19, 1974 (130). The objection was filed by P. McDonough of the American Airlines. That the American Airlines is represented by the present Counsel for plaintiffs (133-135).

The witness then contended that defendant's sales agency agreement has been terminated because its bond has been terminated (136). That the bond expired on August 29th and

"EXHIBIT C" - PAGES FROM BRIEF - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

POINT I

(a) THE ORDER OF SEIZURE HEREIN, VIOLATED DEFENDANTS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The only reasonable interpretation revealed by the record is that this matter was born during the prior trial after plaintiff counsel had threatened he was going to run the Monellos out of business (616). (He denied making this threat (662) but his actions were to the contrary). Thereafter a series of pure coincidences followed. First we have a call from the courthouse to Maureen Doyle from Mrs. La Morell and Mr. Fleig about the Monello passbook (481, 482). Miss Doyle located the pass book and the Monello file but same *immediately disappeared* (482). (It contained the bank book, correspondence and a blank hypothecation (447, 449)).

Next when North Shore issued a check to pay plaintiff (Exhibit 1), this check did not go through regular channels but was unduly rushed to North Shore's Bank (146, 147). This check was then returned upon uncollected funds (Monellos claimed otherwise (587) but it was impossible to get photostats of checks deposited from all over the world in time for this trial). The return of this check could have been stopped if North Shore had been notified. Instead North Shore was deliberately misled by a notice from the bank that the *check had been paid* (536, 587) and Mrs. Monello's first notification that the check was unpaid was on July 24 when Mr. Romans made such a statement (538).

Because of the doubts that may have been caused by the above facts, the usual channel were not followed. Instead an application was made for a warrant of seizure and in same the following statement was obtained:

"* * * and this court being satisfied that there are facts sufficient to satisfy the due process of law requirements

"EXHIBIT C" - PAGES FROM BRIEF - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

of the Fourteenth Amendment to the Constitution of the United States* * *" (12A).

(This statement, of course bound all judges of concurrent jurisdiction but does not bind an Appellate Court).

To make sure that this seizure put defendant out of business a fictitious value of $452,000 was alleged as this prevented North Shore from getting the benefits of CPLR 7102(e) as it was well aware to plaintiff, that no bonding company would give North Shore a bond in the sum of $900,000 (103, 104). This is apparent because Mr. Saunders admitted that the blank stock in a safe deposit box has *no* value (167, 168). He then was allowed to state, over objection, that the airline ticket stock is analogous to a blank check (167).

(The Court was not informed that the same *attorneys for plaintiffs* has previously procured from this Court, an opinion to the *contrary*, which held that once an agency's rights to issue tickets has been revoked, the properly stamped tickets become useless paper *Antar v. T.W.A.* 66 Misc. 2d 93 affirmed 37 App. Div. 2d 921).

Thereafter the *coup de grace* was delivered by informing the newspapers of the seizure (Exhibit BB). This had the effect of scaring away North Shore's clients and causing those with purchased tickets to run to North Shore for refunds to the time of over $7000, which moneys plaintiff now refuses to refund to North Shore (154, 156-160, 174, 175).

However, one more right remained to North Shore to be reinstated but that was overcome by counsel (who also represented American Airline (212)). by having Mr. Scantlebury of American Airlines stop the reinstatement with no valid excuse (186, 191, 192).

Certainly the right of Mr. and Mrs. Monello to make a living for themselves and their 4 children was a valuable property right and this warrant of seizure deprived them of the protection of the fourteenth amendment and same should be vacated and set aside.

"EXHIBIT C" - PAGES FROM BRIEF - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

unless the complaint and affidavits *clearly indicate* that the plaintiff *must* ultimately fail.' " (emphasis in original)

Here the affidavits in support of the writ failed to inform the Court as to the true merits of the case and that the fixing of a bond at an outrageous figure which precluded defendant from getting back the property, shows the weakness of the replevin statute and thus this court must hold the same is unconstitutional under the fourteenth amendment.

POINT II

THE PROVEN FACTS THAT WERE IGNORED BY THE COURT BELOW IN ITS OPINION ALTHOUGH THE RECORD CLEARLY INDICATED THAT THE RETURN OF THE CHECK WAS THE RESULT OF A VICIOUS CONSPIRACY, SO THEREFORE UNDER THE FACTS THERE WAS NO BREACH OF THE CONTRACT BY NORTH SHORE.

The vicious acts that led to the return of the check (Exhibit 11) as set forth in Point I herein were clearly overlooked in the opinion of the Court (204A-211A) and were not decided against appellant. Clearly CPLR 4212 (b) was not followed by the trial court, and this court has only recently held that such a failure requires a new trial before another justice.

Lenkay Sani Products Corp. v. Benitez 47 App. Div. 2d 524.

The Court failed to refer to the testimony of Richard R. Saunders that when a bank has wrongfully given notice that a check has been dishonored, the plaintiff has withdrawn the late remittance charge (75). That when a check is returned and an error is committed, on occasions they have withdrawn their charges of a late remittance (118). This was a practical interpretation of the contract and they are bound by same:

"EXHIBIT D" - EXTRACTS OF TESTIMONY - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

BY MR. BRODERICK:

Q Mr. Saunders, do you have any special account with the Federal Reserve Bank of New York?

A Not to my knowledge.

Q When I say you, I mean Air Traffic Conference.

A Not to my knowledge.

Q Do you know whether New England Merchants Bank has a special account with the Federal Reserve Bank of New York?

A I do not know.

Q Do you know whether that check, Plaintiffs' Exhibit No. 11, was submitted to the Federal Reserve bank in Boston?

A I do not know.

Q Did you ever direct anyone of New England Merchants Bank to hand-deliver North Shore Travel's checks to the Federal Reserve bank in New York?

A No, sir.

Q Do you know if anyone working for you, including your attorneys, directed anyone to have North Shore Travel's checks hand-delivered from New England Merchants Bank to the Federal Reserve bank in New York?

A Not to my recollection.

"EXHIBIT D" - EXTRACTS OF TESTIMONY - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

Q You don't know?

A No, sir.

Q If I understand travel agency tickets, it is a blank piece of paper, is it not?

A It's blank insofar as flight information is concerned.

Q It is valueless, is it not?

A In that form, yes.

Q It is the same as a check, it is not written in, there is nothing to it, isn't that correct?

A That is correct.

Q So if you don't use this ticket stock, there is no value to them, isn't that correct?

A That is correct.

Q But yet you say --

THE COURT: No, that is bad.

Q Is it not a fact, Mr. Saunders, that the reason you have the figure $452,000 in there is that you know no travel agency can meet the bond of $900,000 that you posted or you attempted to post when you issued the order to show cause?

MR. ROMANS: Objection.

THE COURT: I will allow him to answer that.

"EXHIBIT D" - EXTRACTS OF TESTIMONY - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

A No, sir.

THE COURT: All right, gentlemen, tomorrow morning at 9:45.

Let the record show that I have just directed Mr. Saunders to be here for the balance of the trial. Do you wish to withdraw this subpoena at this time?

MR. BRODERICK: There was another subpoena duces tecum, your Honor. There were certain memorandums that I think would be relevant to the case, like No. E, an internal memorandum of ATC defining objection to reinstatement. I don't think that issue has been brought up to the Court yet.

THE COURT: I am not going to evaluate the subpoena, not at all, because I feel at this time that the subpoena was improperly served. But that is neither here nor there.

MR. BRODERICK: I personally served this.

THE COURT: We feel that it was not properly served.

(A recess was taken.)

- - -

"EXHIBIT D" - EXTRACTS OF TESTIMONY - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

THE WITNESS: 479 tickets were sold for the period used as the basis for arriving at a value of the tickets in this proceeding, and a net remittance. And then it is just mathematical, dividing the number of tickets sold into the total net remittance, and you arrive at an average value per ticket, and that is what this document is.

THE COURT: And how do you arrive at the $456,000-plus?

THE WITNESS: Once you arrive at a value, average value per ticket, that is multiplied times the number of tickets on hand in the travel agency.

THE COURT: Thank you. Yes, you may see it, counsel.

MR. BRODERICK: May I have that marked for identification, your Honor?

THE COURT: You are asking it be marked for identification?

MR. BRODERICK: Please.

(Marked Defendant North Shore Travel's Exhibit G for identification.)

Q Mr. Saunders, looking at that again to refresh your recollection if you need to, is any of that writing

"EXHIBIT D" - EXTRACTS OF TESTIMONY - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

I have instructed counsel relative to not doing that practice again. Now let us go on from this point.

Q When did you receive that objection?

A August 20, 1974.

Q August 20, at approximately what time?

A At exactly 4:49.

Q 4:49?

A Yes, sir.

THE COURT: That would be P.M., I presume?

THE WITNESS: P.M.

Q And you received the letter requesting reinstatement on what date?

A On August 5.

Q And you mentioned that an objection must be raised within fifteen days, isn't that correct?

A That is correct, sir.

Q Would the fifteen days here have been up on August 19, 1974?

A No, sir.

Q In your opinion it is up on August 20, is that correct?

A Yes, sir.

Q What is your basis for that determination?

"EXHIBIT D" - EXTRACTS OF TESTIMONY- ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

THE COURT: I just counted off on my fingers.

Go ahead now, next question.

Q Mr. Saunders, you testified when you receive the letter you immediately mail it out, is that correct?

A Yes, sir.

Q And the reason you must immediately mail it out is that during this period of time the travel agency is suspended, is he not?

A Yes, sir.

Q And the reason you immediately send it out is so that the travel agency can be back in business immediately, as soon as possible, isn't that correct?

A We do it to certainly accommodate the travel agent. Certainly.

Q But you do not count the day that the request is received then, do you?

A No, sir.

Q Who makes that determination?

A It's based on the resolution which says within fifteen days of the mail vote, and that is a construction applied to all mail votes. We have many forms of mail votes. As a matter of fact, the fifteen-day mail vote is our standard conference mail vote procedure.

"EXHIBIT D" - EXTRACTS OF TESTIMONY - ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

A Nor would the plate be used.

MR. BRODERICK: I have no further questions on that point. May I see the exhibits on the checks.

THE COURT: Yes.

Q I show you Exhibit 11 in evidence. Do you recognize that check?

A Yes, sir.

Q That is the check that was returned by Hempstead Bank, isn't that correct?

A Yes, sir.

Q Do you have a checking account with the Federal Reserve bank, does Air Traffic Conference have a checking account with the Federal Reserve bank?

A Not to my knowledge.

Q Do you know whether the New England Merchants Bank has an account with the Federal Reserve bank?

A I do not know, sir.

Q I believe you testified earlier you did not direct anyone to hand-deliver that check from Boston to New York, is that correct?

A That is correct.

Q Did you ever direct anyone to have North Shore's check delivered to the New England Merchants Bank, taken

"EXHIBIT D" - EXTRACTS OF TESTIMONY- ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

from New England Merchants Bank and hand-delivered to the Federal Reserve bank in New York?

A No, sir.

Q You never authorized that?

A No, sir.

Q Do you know of anyone working for you who authorized that?

A No, sir.

Q Do you know whether New England Bank did that?

A No, sir.

Q You have no idea whether they did that or not?

A No, sir.

Q Mr. Saunders, has North Shore Travel submitted a claim to you in the sum of $7,082.90?

MR. ROMANS: Your Honor, I would object to that question as being totally irrelevant to the issues.

THE COURT: I don't know yet. Objection is overruled. You go right ahead.

Q Mr. Saunders, would you please answer that.

A I cannot confirm that precise figure to the penny. We do have a claim from North Shore for something over $7,000.

Q Correct, and this is for moneys paid to you, isn't

"EXHIBIT E" ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association; PAUL R. IGNATIUS, as President of the Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; and WILLIAM M. HAWKINS, JR., as Executive Secretary of the Airline Finance and Accounting Conference, a division of the Air Transport Association of America,

Index No. 10002/74

Plaintiffs,

-against-

ANSWER

NORTH SHORE TRAVEL SERVICE, INC.,

Defendant,

and CHRISTENSEN A. FLEIG, MARIE H. LAMORELL and HEMPSTEAD BANK,

Additional Defendants on claims

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PATRICK F. BRODERICK, ESQ., as attorney for the defendant, NORTH SHORE TRAVEL SERVICE, INC., answers the complaint of the plaintiffs as follows:

1. Upon information and belief admits paragraphs "1" and "2".

2. Denies paragraphs "3","4","5", "6", "7", "8", "9" "10" and "11" except as admitted in defendant's affidavit in opposition to the Order to Show Cause and its' affirmative defenses and counterclaims.

FIRST AFFIRMATIVE DEFENSE AND COUNTERCLAIM:

3. The defendant, NORTH SHORE TRAVEL SERVICE, INC., ("NORTH SHORE") and the HEMPSTEAD BANK OF NEW YORK ("BANK"), a New York corporation doing business in the State of New York,

"EXHIBIT E" ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

entered into a contractual relationship whereby North Shore in consideration for its deposit of monies with the Bank into a checking account, the Bank promised to honor the checks drawn on such an account.

This account was originally opened at the Syosset branch of the Bank but at the time the contract was breached, the account was at the Hempstead Bank, Hempstead Branch, account number 011009354.

4. During the pendency of this account with the Bank a relationship pursuant to the contract developed between North Shore and Mr. Christensen A. Fleig, an officer of the Bank. The relationship was such that many times checks would be cashed by the Bank, through its officer, Mr. Christensen A. Fleig even though there may not have been sufficient money to cash the checks drawn on the account.

5. Upon information and belief sometime from July 8, 1974 to July 18, 1974, the plaintiffs contacted the Bank and requested them to testify at the trial between plaintiff and North Shore commencing on July 22, 1974.

6. Plaintiffs had all ready received our papers in opposition to their original Order to Show Cause in action 8740.1974, whereby North Shore claimed the fault of some prior dishonored checks was that of the Bank's and not North Shore.

7. Yet the Bank, with the Bank statements reflecting all of the deposits and money available on July 18, 1974 through July 22, 1974, which was approximately $49,000.00 wrongfully and intentionally breached its contract with North Shore by dishonoring the check drawn to the order of the plaintiffs in the sum of $16,917.40. North Shore's affidavit in opposition to the Order to Show Cause is attached and made a part of this complaint.

8. This intentional breach of contract was caused

"EXHIBIT E" ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

by the plaintiffs inducement and interference with the Bank's contract with North Shore and by the Bank through its officer, Mr. Christensen A. Fleig, intentionally breaching its contractual relationship with North Shore when it wrongfully failed to honor such check.

9. As a result of the plaintiffs, the Bank's and Mr. Christensen A. Fleig's intentional breach of such contractual relationship existing between the Bank and North Shore, North Shore has had to cease operations of its business and has incurred money damages in the sum of ONE MILLION ($1,000,000.00) DOLLARS.

SECOND AFFIRMATIVE DEFENSE AND SECOND COUNTERCLAIM:

10. The defendant repeats, reiterates and realleges all prior paragraphs as it set forth at length herein.

11. At all the times herein mentioned, North Shore was engaged in business as a travel agent, and was so engaged in such business for more than seven years prior to the times mentioned and during that period had established a reputation in the community and among his creditors and those who otherwise knew him as a travel agent of high standing and excellent reputation and had established a high credit for the punctual payment of all indebtedness contracted by it.

12. At all the times herein mentioned, North Shore was a depositor in the Hempstead Bank of the State of New York, the additional defendant above named, and was accustomed to deposit with the said additional defendant, moneys and commercial papers which said moneys and the avails of commercial papers additional defendant agreed at all times to hold for the defendant's account and to pay out by check drawn by the defendant whenever duly presented.

13. Heretofore and on or about the 15th day of July,

"EXHIBIT E" ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

be paid by said bank, which said statement was false and untrue and was known to be false and untrue to the bank.

27. As a result of the foregoing acts of the Bank, North Shore has been damaged and seriously injured in its good name and its credit with the drawee of the said checks and other creditors has been seriously damaged and impaired and it has suffered great mortification, mental stress and anguish all to its damage in the sum of ONE MILLION ($1,000,000.00) DOLLARS.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE AND COUNTERCLAIM AS AGAINST THE PLAINTIFFS ONLY:

28. Defendant, North Shore, repeats, reiterates and realleges all prior paragraphs hereinabove stated as if more fully set forth at length herein.

29. The agreement between the plaintiffs and the defendant further specified that if the chattels are seized then the travel agency may send a letter to the plaintiff requesting reinstatement. The letter is forwarded to the various airline members of the Air Traffic Conference (ATC) and if no objection is raised by mail vote within 15 days then the travel agency is automatically reinstated and the chattels are returned to the agency.

30. The defendant has complied with these rules and yet they still have not been reinstated. As a result of the failure to be reinstated by plaintiff, defendant North Shore has been damaged in the sum of ONE MILLION ($1,000,000.00) DOLLARS.

AS AND FOR A SIXTH COUNTERCLAIM:

31. Defendant, North Shore, repeats, reiterated and realleged all prior paragraphs hereinabove stated as if more fully set forth at length herein.

32. The plaintiffs and the Bank have wilfully, intentionally and maliciously prevented North Shore from operating his

"EXHIBIT E" ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

business and have breached their contractual relationship to North Shore in absolute disregard of his rights. North Shore has suffered damages to his business. As a result of such reprehensible conduct on the part of the plaintiffs and the Bank, North Shore now requests punitive damages in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS.

WHEREFORE, Defendant NORTH SHORE TRAVEL SERVICE, INC., demands judgment against the plaintiffs and the additional defendants, dismissing the plaintiffs amended verified complaint; defendant demands judgment against the plaintiffs and the additional defendants on the first counterclaim in the sum of ONE MILLION ($1,000,000.00) DOLLARS; on the second counterclaim in the sum of ONE MILLION ($1,000,000.00) DOLLARS; on the third counterclaim in the sum of ONE MILLION ($1,000,000.00) DOLLARS; on the fourth counterclaim in the sum of ONE MILLION ($1,000,000.00) DOLLARS; on the fifth affirmative defense in the sum of ONE MILLION ($1,000,000.00) DOLLARS; and on the sixth counterclaim in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS, together with the costs and disbursements of this action.

Yours, etc.

PATRICK F. BRODERICK
Attorney for Defendant
NORTH SHORE TRAVEL SERVICE, INC.
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(212) 229-6070

TO: CHADBOURNE, PARKE,
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30 Rockefeller Plaza
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TO: DALTON & HENOCH, ESQS.
Attorneys for Defendants
Hempstead Bank, Marie Lamorell
and Christensen A. Fleig
50 Clinton Street
Hempstead, New York 11550

BEST COPY AVAILABLE

NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NORTH SHORE TRAVEL SERVICE, INC., Plaintiff, -against- JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association; PAUL R. IGNATIUS, as President of the Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; WILLIAM M. HAWKINS, JR., as Executive Secretary of the Airline Finance and Accounting Conference, a division of the Air Transport Association of America, AIR CANADA, ALLEGHENY AIRLINES, INC., ALOHA AIRLINES, AMERICAN AIRLINES, INC., BRANIFF INTERNATIONAL, CONTINENTAL AIRLINES, INC., DELTA AIRLINES, EASTERN AIR LINES, INC., HAWAIIAN AIR LINES, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, NORTHWEST AIR LINES, OZARK AIR LINES, PIEDMONT AVIATION, SOUTHERN AIRWAYS, TRANS WORLD AIRLINES, INC., and UNITED AIR LINES, INC., Defendants.	76 Civ. 538 (JM) NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

PLEASE TAKE NOTICE, that upon the attached papers, the plaintiff will cross move before the Honorable Jacob Mishler, on the 4th of June, 1976, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, at 10:00 a.m. or as soon thereafter as counsel may be heard for

NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT.

an order pursuant to the Federal Rules of Civil Procedure, granting plaintiff Partial Summary Judgment in the sum of $9,082.90, which represents the sum of $7,082.90 in refunds received by the airlines who compose the Air Traffic Conference, along with the sum of $2,000.00, which represents refunded tickets held by plaintiff, together with such and other further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York
May 24, 1975

BERNARD MEYERSON

BERNARD MEYERSON
Attorney for Plaintiff
16 Court Street
Brooklyn, New York 11241
(212) 643-1335

TO: CHADBOURNE, PARKE, WHITESIDE
& WOLFF
Attorneys for all Defendants
except Hawaiian Airlines, Inc., and
North Central Airlines, Inc.
30 Rockefeller Plaza
New York, New York 10020
(212) 541-5800

AFFIDAVIT OF BERNARD MEYERSON IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

NORTH SHORE TRAVEL SERVICE, INC., :
Plaintiff, : 76 Civ. 538 (JM)
-against- :
JOSEPH F. HINTERSEHR, etc., et al., : AFFIDAVIT
Defendants. :

- x

STATE OF NEW YORK)
) S S. :
COUNTY OF KINGS)

BERNARD MEYERSON, being duly sworn, deposes and says:

That the defendants, composing of the Air Traffic Association, caused a writ of replevin to be issued, and saw to it that same was published in the newspaper, and then some individual went to the accounts of North Shore Travel with the newspaper article. The clients of North Shore Travel then rushed to its office and demanded refunds. These refunds were made to the tune of $9,082.90. Refunded tickets, in the sum of $7,082.90, were sent to the Air Traffic Conference, who have refused to pay North Shore Travel for these tickets.

That the Air Traffic Conference made an untruthful assertion that North Shore Travel owed them money, and got the bonding company to pay the money demanded to wit. It's assumed that, in the future, the bonding company will get back the money but, in the meanwhile, the Air Traffic

AFFIDAVIT OF BERNARD MEYERSON IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

Conference cannot contend that there are any outstanding bills.

That the attached motion, in the form of a demurrer, is an admission that the allegations in the pleadings are true.

It is noticed that, the moving papers very carefully avoid any reference to these monies so, therefore, admit that same are due plaintiff.

Under the circumstances, this Court should grant a Partial Summary Judgment.

BERNARD MEYERSON

Sworn to before me this
26th day of May, 1976.

AFFIDAVIT OF FRANK MONELLO IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - -

AFFIDAVIT OF FRANK MONELLO IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

5. That on the morning of July 2nd., during a conversation (in the Supreme Court, Nassau County [prior to Hearing]) between deponent, attorney for North Shore and the attorney for ATC, the ATC attorney warned us: "to be reasonable, and give up the stock" and that if we didn't he "had the ways and the means to see that North Shore Travel would never be reinstated", (deponent testified to this in trial before Judge Lynde).

Judge Oppido, after hearing decided that there were factual issues to be decided and denied the order of seizure. The matter was then referred to Justice Meade for "a trial of the issues raised in the complaint", on July 8, 1974.

That on July 8th, the plaintiff could not prove its case in that they did not produce the signed Sales Agency Agreement, as stated in their complaint, and Judge Meade declared a mistrial and ordered that the temporary restraining order was vacated, and: "that this case be tried on the issues raised in the complaint, on July 22, 1974".

6. That on July 22nd, 1974 the plaintiff then went before Justice DiPaola with an "Amended Complaint", and the case was not tried on the issues raised in the original complaint, and then certain things began to occur.

7. At all times it was necessary to secure an ATC Bond to maintain the right to sell airline tickets. There is only one place that furnishes this type bond, and that is through Marsh & McLennan, Washington, D. C., who have an agreement with the ATC and, therefore, the ATC has great influence with this company. To protect this Bond, the company had

AFFIDAVIT OF FRANK MONELLO IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

received an "Irrevocable Letter of Credit" from the bank, and that at one time when the bank tried to be released from this Irrevocable Letter of Credit, before its expiration date, Marsh & McLennan definitely refused.

However, in the trial before Justice Andrew C. DiPaola, [on July 22-24, 1974, in the Supreme Court, Nassau County] suddenly the Irrevocable Letter of Credit is marked "Cancelled January 16, 1974" (Actual expiration date was August 21, 1974), and two employees of the Bank are brought in as the ATC witnesses.

The court was then informed that the bank was holding a Hypothecation and a Bankbook for $11,000.00, and refused to allow North Shore Travel to use or withdraw the funds in this account claiming that this account was pledged and funds frozen against the Irrevocable Letter of Credit. That, in view of cancellation of Letter of Credit, this Bankbook was then again available to insure the payment of checks issued to the ATC.

The court then directed that this Bankbook and Hypothecation be brought in to court.

8. In the minutes of the trial, before Justice Edwin R. Lynde, in the Supreme Court, Nassau County, the testimony of an individual working in the bank revealed, that she removed this Bankbook and Hypothecation from files, in the office of a witness, and gave same to bank witnesses, who then appeared in court and denied they ever saw these instruments.

9. In the meantime, further scheming by the plaintiff was evident. They received a check from North Shore Travel on July 16, 1974, in the sum of $16,917.40, and instead of processing this check through the

AFFIDAVIT OF FRANK MONELLO IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

regular routing system, it was rushed and presented to North Shore's bank on the following day. The bank then claimed it was drawn on uncollected funds, and returned the check unpaid, through the usual channels.

10. However, as a party to a conspiracy, the bank did not advise North Shore Travel that the check was returned as being drawn against uncollected funds, but instead sent a "Notice" stating that same had been paid by the bank. (North Shore received "Notice" during trial, on July 22, 1974). This "Notice", of course, completely mislead North Shore Travel's officers.

11. The check was returned unknown to North Shore Travel, but well known to the ATC and its attorneys, who informed the court of this at the end of the trial.

12. The time was too short for North Shore Travel to obtain all the checks deposited, from all over the country, to show that these cancelled checks had already been collected.

In any rate, it had been the custom of the bank to pay all of the ATC checks, for a consideration, when drawn upon uncollected funds, and further, at this time the bank was protected by the Bankbook and Hypothecation in its possession.

13. That although the ATC claimed in their papers that, North Shore Travel refused to turn over the blank tickets and airline plates, this was a complete lie, as the Replevin papers had been prepared in advance and before North Shore knew that it had been suspended by the ATC. The good faith of North Shore Travel is shown by the fact that,

AFFIDAVIT OF FRANK MONELLO IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

as soon as the Order of Seizure was granted, it voluntarily brought the blank tickets and airline plates to the Sheriff's office in Nassau County.

14. Actually, once North Shore was suspended, the blank tickets and airline plates were useless to it, and the ATC was well aware of this fact since it has previously procured law to that effect, in a case tried by its present attorneys and my attorney, known as Antar v. T.W.A. 66 Misc. 2d 93 affirmed 37 App. Div. 2d 921.

The sole purpose of claiming value of $452,000.00 for these pieces of paper was the known fact that, North Shore Travel would have to furnish a Bond in the amount of $900,000.00, and certainly no bonding company would ever issue such a large, rediculous bond.

15. The real reason that the ATC got out this writ of Replevin, was to get same in the newspapers, after which some individual took a competitor Travel Agent with him and went to North Shore's accounts showing them clippings which, of course, caused a run on North Shore Travel, and that is how North Shore Travel was caused to refund some $9,000.00 worth of tickets which, the ATC still refuses to repay North Shore Travel for, and for which a Summary Judgment is now requested.

16. North Shore Travel, in accordance with the ATC procedure, applied to be reinstated, and no airline protested North Shore's request within the required 15 day period.

However, our status was not reinstated based on the claim that American Airlines had submitted a protest on the 16th day, although in the trial before Justice Edwin R. Lynde [in the Supreme Court, Nassau

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County] the Representative of American Airlines testified that North Shore did not owe them on e cent. Thus, here is a pure violation of the Anti-trust law.

17. The ATC seemed to realize the waviness of its position, and so obtained from the insurance company, which is under its control, an alleged cancellation of North Shore Travel's Bond, and then permanently suspended North Shore Travel.

However, as shown in the Affidavit of deponent's attorney, this letter had no effect and, therefore, this cancellation was without foundation, and in violation of the Anti-trust Act.

18. Thereafter, there was nothing for the court to try, because when North Shore's surety was cancelled, it no longer had the right to sell airline tickets.

Consequently, the Supreme Court, in Nassau County, limited its opinion s olel y to the fact that the check was returned, and refused to consider all testi mony that showed both, that the Constitution al rights of North Shore Travel had been violated, and that by its actions the ATC had lost its immunity un der the Anti-trust law.

Certainly, deponent's right to make a living for himself, his wife and four small children was a valuable property right, and the conspiracy of the ATC to deprieve deponent of the right was a violation of the Fourteenth Amendment.

My counsel has quoted law to the effect that, a writ of replevin is an in rem proceeding, and does not bar a party from any other

AFFIDAVIT OF FRANK MONELLO IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

rights he has.

Accordingly, the motion to dismiss should be denied in all respects, and in addition, a Partial Summary Judgment should be granted for the amount of money owed North Shore Travel Service, as set forth in affidavit of North Shore's counsel.

FRANK MONELLO

Sworn to before me this
27th day of May, 1976.

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AFFIDAVIT OF BERNARD MEYERSON IN OPPOSITION TO MOTION TO DISMISS.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

NORTH SHORE TRAVEL SERVICE, INC., :
Plaintiff, :
-against- :
JOSEPH F. HINTERSEHR, etc., et al., :
Defendants. :

- x

76 Civ. 538 (JM)

AFFIDAVIT

STATE OF NEW YORK)
) SS.:
COUNTY OF KINGS)

BERNARD MEYERSON, being duly sworn, deposes and says:

That he is the attorney for the plaintiff, and represents North Shore Travel Service, INC., in its Appeal.

There has been no finality in the litigation herein. After the decision of the Appellate Division, your deponent filed a notice of appeal as of right.

Pursuant to Section 5601 [b] CPLR, the Court of Appeals, however, dismissed this Appeal on the ground that it was not appealable as of right. However, your deponent is now making a Motion for Leave to Appeal, pursuant to Section 5514 [a] CPLR. Deponent feels that there is a very good chance this Motion will be granted, in view of the very recent opinion of the Supreme Court in Curtis Circulation Co., v. Sugar, U.S. Law Week L4416, (referred to in the New York Law Journal of March 26, 1976).

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The contention has been put forth in the moving papers that, this non-filed decision of the Appellate Division, is not conclusive as to the present cause of action. Furthermore, the constitutionality of this replevin will be further tested in the Federal Courts.

Before deponent even discusses this contention, we wish to call this Court's attention to the minutes of the trial, [Vol. I - P. 74] before Mr. Justice Lynde, which reads as follows:

> "THE COURT: In order that the record may reflect a conference that was held in chambers, I have advised the attorney for the defendant that I am not going to permit him to enter testimony relative to the Civil Aeronautics Board's attitude towards the ATC as to whether their practices are regular or irregular, because I feel that it has no probative value in the case at all. You may have your exception accordingly, Mr. Broderick.
>
> You may proceed, counselor."

Thus, this Court can now see that all questions of this Anti-trust were kept out of the records, and the court limited its decision to the bare fact that there was a contract which provided for Agency's cancellation if it were assessed with four (4) late remittance charges, and that devoid of all reasons for same, there were four (4) late remittances charged, and it granted judgment. The judgment contained the following: [Vol. I - P. 208-a]

> "Consequently, the only issue for this Court to resolve is whether North Shore's check for the pay period ending

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July 10, 1974 was dishonored and constitutes two late remittances. The outcome of [illegible]ary issues rest on this determination.

In Carmody-Wait, Second Edition, Chapter 82, Section 82:187, reads as follows:

"Conclusiveness on, and effect as res judicata against, defendant.

The defendant in an action to recover a chattel is not barred by judgment against him from pursuing any other rights he may have aside from those based upon the right of possession. Thus, a judgment for possession of conditionally sold goods in favor of the vendor did not preclude the defendant purchaser from pursuing his statutory right to recover installments paid if the seller failed to resell the goods for the buyer's benefit in manner and time as then prescribed by law. * * * "

As far back as 1903, the Supreme Court stated in Finney v. Gery, 189 U.S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839:

" * * * no such issue was involved in the Hansen case, and the opinion regarding such question is only the opinion of the very able Judge who gave it upon an abstract proposition as distinguished from an adjudication upon a point actually in issue. * * * "

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The New York law is to the same effect, in the case of Donahue, v. New York Life Insurance Co., 259 N.Y. 100, the opinion of the Court of Appeals contained the following:

> "A judgment is conclusive upon the parties only in respect to the grounds covered by it and the facts necessary to uphold it, and although a decision, in express terms, professes to affirm a particular fact, if the fact was immaterial to the issue and the controversy did not turn upon it, the decision will not conclude the parties in reference to such fact. It does not work an estoppel as to unessential facts, even though such facts are put in issue and decided. Springer v. Bien, 128 N.Y. 99, 102, 27 N.E. 1076; House v. Lockwood, 137 N.Y. 259, 268, 33 N.E. 595; Rudd v. Cornell, 171 N.Y. 114, 128, 63 N.E. 823; Stokes v. Foote, 172 N.Y. 327, 65 N.E. 176; Silberstein v. Silberstein, 218 N.Y. 525, 113 N.E. 495; People ex rel. McCanliss v. McCanliss, 255 N.Y. 456, 175 N.E. 129."

Furthermore, the case below was tried upon a contract which was not signed by North Shore Travel Service, Inc. The contract was admitted into evidence over the objections of North Shore Travel's counsel. This can be seen by the fact that on August 20, 1974, after the commencement of the lawsuit in the Supreme Court, Nassau County, the Air Traffic Conference sent a letter to North Shore Travel, [annexed as "Exhibit A"] requesting that they sign the revised Sales Agency Agreement which, of

AFFIDAVIT OF BERNARD MEYERSON IN OPPOSITION TO MOTION TO DISMISS.

course, North Shore Travel refused.

First, this Court should refer to the shocking statement found [on Page 8] in the Affidavit of Richard R. Saunders, who claimed that North Shore Travel waived the furnishings of any Replevin Bond. This is absolutely untrue. Deponent is attaching hereto, [as "Exhibit B"] a copy of Page 107, from the minutes of the hearing, on August 1, 1976, before Justice Burstein, which shows that the Bond was not waived, and is further attaching a copy of the Order of Seizure [as "Exhibit C"], signed by the Honorable Beatrice S. Burstein on August 1, 1976, which states:

> "AND it further appearing that an undertaking executed by sufficient surety as required by law having been submitted herewith,"

This Court will further notice, that the opinion of the Appellate Division - Second Department, was based upon the assumption that a sufficient bond had been furnished for the protection of North Shore Travel Service, Inc.

Therefore, the Appellate Division was mislead, and your deponent has been mislead. This is typical of the tactics of defendants throughout this litigation. Evidently, an attorney representing the Air Traffic Conference was too anxious to rush to North Shore Travel's place of business to disrupt everything, and embarass North Shore Travel before its clients. (This appears in Testimony of the trial [Pages 487 & 488 - Vol. II] before the Supreme Court of Nassau County.)

Evidently, the Air Traffic Conference had something to fear,

and wished to deprieve North Shore Travel of its right to do business, so it prevailed upon the bonding company to send out a letter of cancellation, of North Shore Travel's ATC Bond, and then at the trial the ATC announced that North Shore Travel had been terminated because its Bond had been cancelled.

Consequently, the question of the issues of the trial were academic even before the trial started and, therefore, the trial Judge knew if it made any decision in favor of North Shore Travel, it would have been a waste of time, since North Shore Travel had already lost its right to do business.

Once again, in its haste to injure North Shore Travel, the ATC made another mistake. This letter of cancellation, as a matter of law, was useless because it did not refund to North Shore Travel the rebate portion of the unearned Bond Premium. Therefore, at the time that the ATC revoked North Shore Travel's right to do business, it was violating all the rules set forth when it was allowed immunity to Anti-trust laws, as the Bond was still in effect when they took their action.

In the early case of Runkle v. Citizens' Insurance Co., 6F - 143, this rule was set down, and has been consistently followed. The opinion contained the following:

> " * * * The insurance may also be terminated at any time at the option of the company by giving notice to that effect, and refunding a ratable portion of the premium for the unexpired term of the policy. It

> is within the province of the parties to a contract of insurance to stipulate in the policy that the assured may at any time terminate the contract and surrender the policy, and be entitled to a ratable portion of the unearned premiums; and that the insurer may at any time at its option terminate the contract and cancel the policy by giving notice to the assured to that effect, and paying to him a ratable portion of the premium for the unexpired term. * * * "

The same rule is followed in New York State law, as in the case of VanValkenburgh v. Lenox Fire Insurance Co., 51 N.Y. 465, the opinion contained th e following:

> " * * * Until such tender or payment, the cancellation rested upon a notice merely. The defendants gave notice that on a day named it would hold the contract to be at an end. There was no provision in the policy, nor is there authority of law, for a cancellation by notice unaccompanied by payment of the money. 2. The payment actually made was insufficient in amount. It was the business of the defendant in making the payment to be certain that enough was paid. "A ratable proportion of the unexpired premium" must be paid. This is a positive condition precedent upon the performance of which their release depends. * * * "

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Actually, this Affidavit would be too voluminous to give the Court all details, and this Court is referred to "Exhibit D" of the moving papers for some inkling of the facts herein, and the missing papers to wit [Page Nos. 7-23] are hereby attached.

Let it be said that, in the trial in the Supreme Court, Nassau County, the testimony of North Shore's officer was to the effect that, counsel for the ATC vowed to get North Shore Travel, and that when North Shore Travel submitted its usual periodic check for payment, the check admittedly was not processed through the usual channels, but was rushed to plaintiff's bank ahead of time.

The bank had sufficient security to pay the check, and it lulled North Shore Travel's officers into an action by sending them a "Notice" that the check had been paid, and then unknown to the officers of North Shore Travel, the check was returned as "Uncollected Funds".

To make matters more shocking, we find that Judge DiPaola [on July 23, 1974, in the Supreme Court, Nassau County] had ordered the bank to produce the securities consisting of: a Bankbook for the sume of $11,000.00, and a Hypothecation; and that this vital evidence, according to the testimony of the Bank's employees, was given to the witness who had received the Order from the court, and this witness then claimed he had never seen same.

When all these facts are put together, this Court will readily see that the ATC was engaged in a conspiracy to ruin North Shore Travel.

The papers herein, were served on deponent's office during

AFFIDAVIT OF BERNARD MEYERSON IN OPPOSITION TO MOTION TO DISMISS.

a time when deponent was out of town, on vacation, and accordingly he has not had time to prep are a Memorandum of Law, as to the liabilities of defendants.

However, he has been fortunate in obtaining an opinion in the case of Lowe v. International Air Transport Association, by Mr. Justice Stewart of the Southern District. Counsel for defendants in that case, is the same counsel as the present Defendants' counsel, and consequently they are well aware of this Opinion and have copies of same in their office. This Opinion has not yet officially been published in the reports and, therefore, deponent is submitting the entire Opinion to this Court.

From this Opinion, this Court will readily see that the vicious vindictiveness and acts of conspiracy that were used to put this Plaintiff out of business, have caused the Air Traffic Conference to lose its Immunity to Suit, under the Anti-trust Act.

WHEREFORE, your deponent requests that the Defendants' Motion to Dismiss the Complaint be denied, and that Plaintiff be granted Partial Summary Judgment in the sum of $9,082.90, together with such other and further relief as to this Court may seem just and proper.

BERNARD MEYERSON

Sworn to before me this
25th day of May, 1976.

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"EXHIBIT A" ANNEXED TO AFFIDAVIT OF BERNARD MEYERSON.

Air Traffic Conference of America

A Division of Air Transport Association of America

1709 New York Avenue N.W. • Washington, D.C. 20006

AGENCY DIVISION

Phone (202) 872-4076

August 20, 1974

Dear Travel Agent:

You were previously sent a revised Sales Agency Agreement requesting that it be signed and returned prior to May 20, 1974.

Our files do not reflect receiving the executed Memorandum of Agreement from your Agency. The governing rules require the termination of the Agreement and the Agent's removal from the Air Traffic Conference Agency List if the properly executed copy is not returned within a specified period of time.

Therefore, we are enclosing a new Agreement requesting that it be signed and that the ATC copy of the Memorandum be returned to ATC prior to August 31, 1974. The enclosed color coded envelope may be used for this purpose.

Please give this matter your immediate attention.

Very truly yours,

Arch T. Mouser
Manager - Applications

ATM:scb

Enclosure

-FROM-

AIR TRANSPORT ASSOCIATION of AMERICA
1709 NEW YORK AVENUE, N. W.
WASHINGTON, D. C. 20006

To Northshore Travel Service, Inc.
40 Underhill Blvd.
Syosset, N.Y. 11791

CERTIFIED
No. 755604

NL
8-22-74

"EXHIBIT B" ANNEXED TO AFFIDAVIT OF BERNARD MEYERSON.

I am going to the Sheriff's office; am I correxct? You have waived any bond?

MR. BRODERICK: Yes, we waive the bond.

MR. ROMANS: And that the plaintiffs will pay for the expenses of renting a safe deposit box which will contain the chattels pending the final disposition of this case, final disposition, and that expense will be a disbursement awarded at the --

MR. BRODERICK: I won't consent to anything. Plaintiff has to submit the bond. The Sheriff pursuant to Court order, the Sheriff is to hold these bonds pending determination of the trial.

MR. ROMANS: The chattels.

MR. BRODERICK: Chattels.

MR. ROMANS: Tickets and related paraphernalia.

MR. BRODERICK: Chattels and everything will be held by the Sheriff pending the determination of this action, not to be returned to the plaintiff after the normal

"EXHIBIT C"-ORDER OF SEIZURE- ANNEXED TO AFFIDAVIT OF BERNARD MEYERSON.

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Courthouse in Mineola, New York on the 1st day of ~~July~~ August 1974.

P R E S E N T :

HON. BEATRICE S. BARSTEIN .

Justice.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

- -x

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association; PAUL R. IGNATIUS, as President of the Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; and WILLIAM M. HAWKINS, JR., as Executive Secretary of the Airline Finance and Accounting Conference, a division of the Air Transport Association of America,

Plaintiffs,

-against-

NORTH SHORE TRAVEL SERVICE, INC.,

D fendant.

ORDER OF SEIZURE

Index No. 10002/74

- -x

A motion having been made by the plaintiffs herein pursuant to Section 7102 of the Civil Practice Law and Rules for an Order of Seizure of chattels belonging to the Air Transport Association and being held by the defendant, in an action in the Supreme Court of the

"EXHIBIT C" - ORDER OF SEIZURE - ANNEXED TO AFFIDAVIT OF BERNARD MEYERSON

State of New York, County of Nassau,

NOW, upon reading and filing the affidavits of Richard R. Saunders and John N. Romans sworn to July 29, 1974, in support of plaintiffs' motion, wherein it appears that a cause of action for replevin of certain chattels therein described exists in favor of the plaintiffs and against the defendant North Shore Travel Service, Inc.

AND it being further shown by said affidavit that plaintiffs are entitled to the chattels therein described and have commenced an action to recover said chattels, and this court being satisfied that there are facts sufficient to satisfy the due process of law requirements of the Fourteenth Amendment to the Constitution of the United States to authorize the sheriff to break open, enter and search for the chattels in the place(s) where they may be, and due deliberation having been had thereon, and upon the record made before Justice T. on the X. Alternate today and upon the stipulation made upon the record before me

AND it further appearing that an undertaking executed by sufficient surety as required by law having been submitted herewith,

NOW, on motion of Chadbourne, Parke, Whiteside & Wolff, attorneys for plaintiffs, it is

ORDERED that the Sheriff of Nassau County or the Sheriff of any county in which the chattels may be found, is directed to seize from defendant, within days of the service of this Order upon him, the airline ticket stock, identification plates, vouchers, miscellaneous charges orders and all other property described in the aforesaid affidavit as belonging to plaintiffs and

"EXHIBIT C" - ORDER OF SEIZURE - ANNEXED TO AFFIDAVIT OF BERNARD MEYERSON.

their airline members; and it is further

ORDERED that if the said chattels are not delivered to the Sheriff, he may break open, enter and search for the chattels in the place where they may be, and he may take the same into his possession. And that pending the trial of this action

ENTER:

Beatrice S. Dunn
J.S.C.

ENTERED
APR 2 1974
HAROLD W. McCONNELL
COUNTY CLERK OF NASSAU COUNTY

"PORTION OF BRIEF IN APPELLATE DIVISION" ANNEXED TO AFFIDAVIT OF BERNARD MEYERSON.

defendant (161, 162). That he told a Miss McDonough of American Airlines that the firm could subsequently withdraw its objection (165). That defendant's application for reinstatement could be considered this December if it was submitted immediately (167).

On re-direct the witness testified over objection that a blank ATC airline ticket stamp is analogous to a signed bank check (167). He admitted that a blank stock in a safe deposit box has no value (167, 168). Over objection he was allowed to testify that its airline members have claims against defendant in excess of thirteen and a half thousand dollars (169).

On re-cross the witness admitted that any application made by defendant would have to be like a travel agency starting all over again (172, 173). He admitted that the members have *not* proven anything to him about the alleged money owed to them. The Court then sustained an objection to the question that the $7,000 owed was not just a claim but it was proven money given to him which defendant seeks to have returned (174).

TESTIMONY ON BEHALF OF DEFENDANT NORTH SHORE

Thomas Scantlebury testified that his position is Manager of Long Island Sales for American Airlines (176). That defendant was one of American Airlines travel agents (177). That he filed the objection for the reinstatement of North Shore Travel as a travel agency with Air Traffic Conference (178). That he had a conversation with Mr. Monello, he told him that he did not want Mr. Hagerty of his firm to come to North Shore Agency any longer because he had lied at the previous trial (179). That North Shore was a fairly good account in terms of production. That North Shore received from him some IATA ticket stock because it had gotten into the Caribbean Market (180). That this was separate and distinct from ATC stock and has a different filing procedure (181, 182). Exhibit M were American Airlines' IATA sales reports covering 15 day period. This showed a delivery to

"PORTION OF BRIEF IN APPELLATE DIVISION" ANNEXED TO AFFIDAVIT OF BERNARD MEYERSON.

American Airlines at 8/20/74 (186). That exhibit M was received on August 19. On that day he received a call from Mrs. Monello and she was excited when he told her he had not received their report. That she later called back and said she had checked with the messenger service and that she had definitely ascertained that it had been delivered to American Airlines. He replied that he had not received same. The messenger service dispatcher called and verified the delivery. It turned out that the delivery was made to a ticket agent, who accepted same and then turned same over to her supervisor but he did not receive same on the 19th. It was his *belief* that they got same on the morning of the 20th. *Nevertheless* he filed an objection. When informed that he had filed the objection at 4:46 P.M. he claimed that he did not take stock of the time but that the objection was issued in the late afternoon (191, 192). That after discussing same with Hagerty he thought it should be put up for review "That was my decision" (191, 192). He told Mrs. Monello that it was all right as far as satisfying the letter but he did not tell her everything was all right (193). Exhibit N informed him that there were no sales in the June 16 to June 30 period (194). He admitted there were no sales because Mr. Hagerty had removed the blank tickets of American Airlines (195). He then claimed that they did not know where the tickets were (197). That he sent Mr. Hagerty out to pick up the IATA tickets, in July and he picked up all the tickets that were there. That when he spoke to Mrs. Monello on August 19 he did not recall her telling him that all the tickets had been seized (204). He admitted that he requested $2,900 in his letter and defendant told him that this sum had been paid (207). That the letter was the basis of his objections to ATC but he did *not* mention to IATA about any moneys owed or tickets missing (209, 210). Although North Shore responded to his letter by the 16th, he did not deem the answer satisfactory (211). That after he received a subpoena from defendant, their legal counsel suggested that Chadbourne, Parks handle the case for them (212).

"PORTION OF BRIEF IN APPELLATE DIVISION" ANNEXED TO AFFIDAVIT OF BERNARD MEYERSON.

John Joseph Buonocore testified that he is employed with the Hempstead Bank and he manages the Syosset office since October 1971 (230). He reproduced the corporate resolution and signature cards (Exhibit R) (231, 232). Salvatore Monello is designated as the president and is one of the signatories for that account (232, 233). That there is a charge for checks presented to the bank either for insufficient or uncollected funds (233). The forms of notices were marked Exhibit S and T (235, 236). The notices sent in 1971 indicate that all checks were paid (236). The Court wrongfully kept from the record all the Air Traffic Conference checks that showed an 8 year course of business with the bank when same were drawn on insufficient or uncollected funds (236, 239). He believed that there was a savings account under Salvatore Monello's name (239). The checking account in his branch was opened on October 3, 1966 and closed in October 1972. A new account was opened in the Hempstead office. The savings account was never at the Syosset Branch (240). That this passbook was given to the Syosset Office of the bank in 1971 as side collateral for a loan to North Shore Travel (241, 242). That after the loan was paid the hypothecation was sent back to the customer. He could only say "probably" about the bank book as the file would not show it (243, 244). That in October 1971, Robert Dilworth was the branch manager for the Hempstead office (248). That on occasions they had conversations with North Shore Travel relative to the Air Traffic Conference checks. That the first time it came up on his overdraft sheets with a substantial overdraft (249). Since October 1970, they must have spoken several times on the account. The following then occurred:

> "Q. Did you ever have a conversation about the importance of cashing ATC checks?
>
> A. I was aware of the importance of these checks being paid, yes" (250).

That the first time they might have spoken about it could have been when a check was being presented against insufficient funds (250). That on a couple of occasions some checks were

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returned to ATC (251). However, the forms shown him indicated that no checks were returned (253, 254). Again he admitted conversations with North Shore concerning the importance of Air Traffic Conference checks. This took place around November 1970. The sum and substances of this conversation were that these checks were important and that they were to be paid (257, 258). Exhibit U represents a credit slip for a 30-day note. The credit that was posted to an account *in error* in April was corrected the following day (259). This was labeled an *unsecured* note. However it was secured in that if a situation came up where the note went to default, they would have the right of resort against the passbook. The loan would not be made without that collateral (261). This was the same as the year before (264). Exhibit 'X' indicated that seven checks were returned and one check was paid. This was an Air Traffic Conference check. (the date was January 1973) (269, 270). Exhibit Y indicated that two checks were sent back but a $20,000 odd check was paid (275). Exhibit AA show 5 checks paid and one check returned (275, 276). That this being an overdraft slip under normal conduct of business it is mailed out the same day. That it was possible that same could be delayed in the mailroom (278). That it was possible that this was mailed out on Monday May 13 (279). Exhibit A13 reflects that funds were wired to the Merchants National Bank, Boston, Mass., account Air Traffic Conference (283, 284). Exhibit No. 9, the check in the amount of $16,062.18 is reflected as paid in Exhibit AC (notice forwarded to defendant (284)) (286). On said exhibit there is a charge of $15 for the handling of the checks that were paid. Exhibit 9 was *not* paid (289, 290). Exhibit AE was a certified check for $16,062.18 made payable to the Hempstead Bank in error and the cashier's check that replaced same (295-298). Said check was sent to ATC with a letter (298). The check was certified on June 24, 1974 (299). Exhibit AF indicates 6 checks were being paid against uncollected funds (300-306). There was a charge of $7.00 for same (306). That exhibit 11 was returned for uncollected funds (310). That there is a numerical

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number on Exhibit AF that coincides with the numerical number on Exhibit 11 (his explanation was "on the supposition", maybe later he heard that an uncollected check was returned not paid (307, 308)) (311). That on July 25, 1974 he had a conversation. She stated that they were looking for a passbook in the name of Salvatore Monello and he answered why look for same. Make up another one and she answered no, it had to do with a loan that we made whereas we had our savings book registered as side collateral on a loan. He then told her that the loan had been paid so its probably in the Hemsptead office. That North Shore Travel was no longer with Syosset and the savings account was never at the Syosset branch (319, 320). There was an hypothecation agreement for both of North Shore Travel loans and both loans but the passbook on the savings account as side collateral (322). That North Shore made most of its deposits in the Syosset branch in the form of cash or checks (326).

On cross-examination the witness testified that no withdrawals were ever made from Salvator Monello's savings account and same was closed only recently (335). That he had discretion to pay insufficient checks. He believed that the limit of his credit line was $15,000 and paying same was in effect a loan (342). That in 1970 or 1971 he returned some checks and two were ATC checks. He remembered one was for about $28,000 and the other about $14,000. They were returned for insufficient funds (343) He was not willing to allow overdrafts *in those amounts.* He admitted discussing ATC checks with Monello. He told them they would do their best to pay the checks but they had to make sure they had money to cover the checks (344).

He told defendant that there was a large overdraft and it was being caused by an ATC check being presented for payment. That he needed a deposit to cover the checks, otherwise he could not pay them (346). He claimed that in many instances a check may be marked paid and for some reason another branch manager at the time probably thought it necessary to return the check after this notice was sent out (355). He finally admitted that one of the ATC checks were returned by Mr. Elliott and not by himself (362).

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Marie H. Lamorell, one of the defendants, testified that she has been assistant branch manager, Hempstead Bank for some 13 months. That she first heard of Air Traffic Conference when the bank received a subpoena in July 1974 from the attorney for the Air Traffic Conference (365, 366). That on July 19, 1974 she spoke to Mr. Romans' secretary on the telephone (367). She was asked if she had all the papers for the case for Monday and she replied that she was sure she had them. At the time she had the original signature card, corporate resolution and most of the statements (367, 368). That during the trial the Court directed her to go out and obtain records of a bankbook (369). She reported to the Court that she researched and looked all through the bank for the bankbook and she still did not find it. That she subsequently found the bank account of Salvatore Monello at the Hempstead branch bank. The account was for $11,000 and odd. That she released these funds to Frank Monello on July 25, 1974 (371). That she released the funds because the withdrawal slip had a signature also a power of attorney with it (Exhibit AM) (372, 373). That this power of attorney was written for the business operating transactions relating to the transfer of North Shore Travel Service, Inc. (374). That she never had a conversation with Mr. Romans concerning that power of attorney. When the withdrawal slip and power of attorney was submitted to her she did not give the funds to Mr. Monello immediately (374). She first called Mr. Frank Bagley who is branch administration and he read the instruments and then said "O.K., make a cashier's check" (375). That exhibit AC, which is a statement sent out by the bank, reflects that a $16,000 check was paid (375-377). That three figures were listed on the notice ($15,000) for paying the checks against insufficient or uncollected funds (377, 378). On the previous trial she answered this question with the remark: "What was sent and what was done are two different things" (379).

On cross-examination this witness again testified that before allowing the withdrawal of the savings account she called bookkeeping to inquire whether there was a hold or block

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against the account and bookkeeping replied no hold (380). That Mr. Monello demanded his money and threatened to have his lawyer after them. She then excused herself and went behind the tellers and spoke to Bagley and read the power of attorney (382). She was unable to detail the $15.00 charges that were made on the slip (383). That it is up to bookkeeping to determine the charges (384, 385). Usually it is $5.00 per check but more when a large sum is involved (385).

Christian A. Fleig testified that he first heard of the North Shore Travel account in 1972 (386). That prior to the time that Mr. Dilworth left the bank, they spoke about this account, once or twice a day (387). He remembered Mr. Dilworth explaining to him about the importance of the Air Traffic Conference checks (389). Dr. Dilworth told him that if checks were returned against that account, it could cause great difficulties and embarrassment (389, 390). That Mr. Dilworth mentioned that a check was returned when he was not present or unavailable to make a decision and it caused big problems with the account (390). At that time Mr. Dilworth wrote a letter or made a phone call to Air Traffic Conference explaining the error as to their sending the check back. That he assumed the responsibility of this account in approximately June 1973 (390). He knew that the Air Traffic Conference checks were very important to North Shore Travel (390, 391). He denied knowing of the $10,000 bankbook hypothecated by Salvatore Monello to North Shore Travel. He became aware of the letter of credit in either July or August, 1973 (391). That if an overdraft was unintentional it was approved (392). Exhibits AN and AO revealed an overdraft for $2,146.27 dated April 25, 1974 and the other is for $5,173.16 dated May 21, 1974 (394, 395). He had nothing to do with the loans made to defendant (396). He did not know if the loans were secured (397). On the prior trial he had testified that when exhibit 8 was presented for payment he called one of the Monellos and told them if they brought the funds in, he would pay the check but he did not remember if he spoke to Frank or Inez Monello (399). That he never saw Salvatore Monello's

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bankbook (401). He was vague on the letter of credit (403). Exhibit 11 was dated July 15, 1974 and its "paid stamp" was conceded July 18, 1974. It was deposited in the N.E. Merchants Bank in Boston and it bore the mention of July 17, 1974 (409, 410). The Federal Reserve Bank date was July 17, 1974 and it got to the Hempstead Bank on July 18, 1974. It was presented to him for payment on July 18, but he did not pay the check (411, 412). It was marked "uncollected funds" *not* insufficient funds (412). That he "ordered the check returned" (412).

Exhibit AP listed defendant's balance on July 17th as $18,708 and the uncollected checks as $10,974 (416, 417). He could not recall if he ever before returned an Air Traffic Conference check before for uncollected funds. He believed that he had returned them for insufficient funds (418, 419). The court wrongfully sustained an objection to the question, whether it was true that he always cashed their checks whether the funds were uncollected or not (419). He believed that North Shore deposits were part cash and part checks (419, 420). He believed that on June 24, 1974, he authorized the issuance of a certified check on uncollected deposits (420). He did not "recollect" speaking to Mrs. Monello about the $10,000 note (421).

On cross-examination the witness testified that no regulation required him to make telephone calls to overdraft customers (422, 423). But he *did make such calls* to defendant (423, 424). He will tell them of the underdraft and if they delivered the money, he would pay the check (424). That Bank's exhibit AS was a printout which showed defendant's bank balance of $11,387 overdrawn and their available balance was *$27,261* uncollected. The date was 5/10/74 (a Friday) so he may have looked at it Monday May 13 (435, 436). He called defendant and advised them of the overdraft and gave them up to 3 o'clock to make a deposit or their checks would be returned (426, 427). He claimed they did not bring in the money and the check was unpaid (426, 427). A day or two later the bank received a wire transfered (which the Monellos' had promised (427)). A wire transfer gets credit as immediate cash (428). That Monellos had

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told him that they had made the wire arrangements and asked him to pay the check but he had sent the check out on the 13th (429). Exhibit AB was a wire transfer to the Merchants National Bank, Boston account of Air Traffic Conference for $14,000 or $15,000. He believed that the wire transfers he had previously received was from the Bank of Tokyo (430). AR the printout that he saw on June 12 was $14,785 overdrawn $16,253 uncollected. The check in the amount of $16,062.18 caused the overdraft. He then spoke to one of the Monellos and told them the account was overdrawn (432, 433). The answer was that they would try and get the funds in but he returned the check (433, 434). That he certified the June 24, 1974 check when the Monellos told him that they were depositing funds that day (435, 436). On that day defendant deposited the sums of $3,349.53 and $15,550.20 (436). The July 18 printout shows a balance of $5,543 of which $5,430 was uncollected and he returned checks (437, 438). He then ordered the $16,917.40 check to Air Traffic Conference returned for "uncollected" funds (439). That the printout (Bank's Exhibit AS) shows a balance of $6,114 of which $4,484 is uncollected. He had no knowledge of any agreement between the Bank and defendant to provide for payment of defendant's checks against insufficient or uncollected funds (441).

On re-direct the witness admitted that these referral sheets referred to balances after the computer has paid the check (442, 443). All checks are marked paid when they come in and the $5,000 balance was because the $16,000 check had been paid (443).

Robert S. Dilworth testified that his present position is vice-president, Continental Bank, Garden City, New York. That he was previously associated with Hempstead Bank in excess of 16 years (443, 444). That he opened the account for North Shore when they established their business in Syosset in mid 1960's. That subsequently he took the account to the Hempstead branch of the Hempstead Bank during the year 1972, he opened the Savings account for Frank Monello in 1971 (444, 445). At the time the bank had instituted a new regulation not to lend on an

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unsecured basis unless bank statements were furnished and he therefore asked Mr. Monello to get his father to pledge or hypothecate a passbook to North Shore Travel until the company prepared financial statements (445). That he executed a hypothecation agreement of Hempstead Bank that was similar with Exhibit AT for identification. That his dad signed the agreement and had it notarized but it was left blank at the time (446). At the time $10,000 was hypothecated. It was a new account opened with the Hempstead office of the Hempstead Bank. It was left in blank, rather than set a new hypothecation each time he wished to borrow on a short term basis. Wrongful objections kept from the record whether the bank could hold on to this $10,000 as security if there was an overdraft by defendant (447, 449). A blank hypothecation means that no terms were set down in same. It was twice used for loans while he was in the bank (448, 449). He left the Hempstead Bank on June 15, 1973. Before he left he sat down with Mr. Christian Fleig and reviewed a number of accounts for which he was responsible for. One of these accounts was that of North Shore Travel (449, 450). That Mrs. Monello called him at his new place of employment and asked him to call Mr. Fleig and ask him why he was returning checks on ATC. He called Mr. Fleig who replied that he could not get in touch with the Monellos and he felt he had to protect himself (451). He did not mention the letter of credit (451, 452). He did mention to Mr. Fleig about a bankbook hypothecated to North Shore Travel during May or June of 1974 (452). That when Mr. Fleig told him the account was overdrawn by some $5,000, he mentioned to him that the passbook was still present in the bank, so that he was protected by the dollars in the passbook. At that time Mr. Fleig stated that it was pledged against or as collateral for a letter of credit. The letter of credit had been issued to back up a bond. It was for one year unless the bonding company notified the bank to renew it for another year (453). That he personally took this blank hypothecation (463). When he left the bank in June 1973, the blank hypothecation *was still in existence* (464). It had been delivered from Mr.

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Buonacore of their Syosset office to the letter of credit department which was a separate department upstairs in the 40 Main Street office (464, 465). The court sustained the objection to the hypothetical questions as to whether the bank should have returned the check (465, 469, 480). Exhibit AU showed that the letter of credit was cancelled in January 1974 (467).

Maureen Doyle testified that she worked for the Hempstead Bank (472). That as part of her responsibility every morning as a branch manager to decide whether or not to pay checks. She was not allowed to exercise discretion over her line of credit. That she was secretary to Mr. Dilworth while he was employed and later to Mr. Fleig, the branch manager. She screened telephone calls and if the manager was not present, she made the calls herself. (474). That she had a conversation with Mr. Marcinkowski who is an operations officer in the 40 Main Street branch of Hempstead Bank (475). That Exhibit 8 was returned by Mr. Marcinkowski (477). She had a conversation with Mr. Fleig during June when the check was returned but she could not remember the conversation (478-480). That during July 22, 23 and 24 while the trial was going on she had a conversation with Mrs. La Morell and Mr. Fleig about the passbook (481, 482). Mrs. La Morell called from Court during a recess and she received the call in Mr. Fleig's place. She said that passbook of $10,000 had been brought up and she wanted her to relay this message to Mr. Fleig. When Mrs. La Morell returned to the branch later on in the afternoon, the witness went to her files in Mr. Dilworth's office and she pulled out the folder of North Shore Travel. Her testimony continued:

> "* * *. In that folder there were carbon copies of general correspondence. A copy of the letter of credit, and a passbook stapled to these. I showed it to both of them, then went about my business, and I never saw the folder again after that. I looked for it to refile it, and I never found it" (482).

Cynthia Marango testified that she is employed by North Shore Travel as an agent and does everything in the office. That

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she calls the bank, makes deposits, handles reservations and invoicing. She is familiar with American Airlines tickets (484). These tickets were brought in by the sales representatives Robert Hagerty. She remembered the week of June 10 to June 15 (485). That she opens the office in the morning at 8:45 and remains there until 6 P.M. On June 12, 1974 she did *not* receive a telephone call from the bank (486). On August 2 she was at work when Mr. Romans came into the office at the time she was speaking to a client and making a reservation on the telephone and he told her that she could not do that. That she could not sell tickets. The clients were present at the time (487). At the time she did not know who Mr. Romans was and she was in the middle of a reservation and she tried to keep the client calm. Wrongful objection prevented further description of the scene that had occurred (488). Exhibit AV was a list of purchases made by North Shore from other travel agencies or directly from the airlines (489). The office is still open (491). North Shore did not receive Commissions from the other agencies (492). The total amount of sales were $97,815.21. The average commission was about 9 percent (493).

On cross examination the witness testified that she called the bank every morning to inquire about North Shore's bank balance. That Mr. Fleig did not call her office between the 15th and the 20th of June. She could not fix the time when he called before June 15th :497). That she took a certified check to the bank later during that month of June (498).

Inez Monello testified that she has been employed by defendant for 7 or 8 years (215, 216). The corporation was first formed on or about October 1966. That its first account was in the Syosset branch of the Hempstead Bank from 1966 until sometimes in 1972. Then the account was transferred to the Hempstead branch of the Hempstead Bank. It was a Commercial Checking Account. That they also put on deposit their savings book in the amount of $10,000 (217, 218). The actual transaction was made on or about April 22, 1971. That the purpose of the bank book was to insure the fact that no North

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Shore Travel checks would ever be returned by the Hempstead Bank. The conversation was with Mr. Robert Dilworth, the bank's vice president (218). That a loan was made with the Hempstead Bank, approximately a short while after the bankbook was put on deposit on April 22, 1971. When the account was opened (221). The bank book was always in the Hempstead Bank. For a while the check account in the Syosset branch and the check account in the Hempstead office overlapped from approximately May through October in 1972 (224). The Syosset account was closed out early in 1973. The Hempstead checking account was opened in September 1972. That the Syosset office was near the office of North Shore Travel. They would make their deposits at the Syosset branch but the checks were drawn on the Hempstead branch (226). They received 50 to 60 notices from the bank in reference to the cashing of checks for insufficient or uncollected funds (227). The period was from October 1972 to June 15, 1973. During that period only one ATC check was returned by the Hempstead Bank and the bank wrote a letter that this was done in error. Objection kept from the record the information as to the charges of the bank for cashing these checks (228).

That she takes reservations and she mainly takes care of the large commercial accounts to see that they are serviced properly and she handles the books (501, 502). That in October 1966 she opened a checking account with Hempstead Bank. At the time Mr. Dilworth was the manager. In October 1972 the account was transferred to Hempstead branch bank (502). That a $10,000 account was opened by Salvatore Monello (504). She first heard the word "hypothecation" when the account was opened (505). That from the time Mr. Dilworth took over the account in Hempstead Bank they never had a check returned to ATC up until May 1974 (517). The corporation received $10,000 on a note on August 3, 1972 (518). On August 17, 1973 there was another $10,000 loan obtained (518, 519). This loan was obtained by calling Mr. Fleig. The money was credited to the corporation's account without the giving of collateral (519). The

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letter of credit was issued in August 1972. It was obtained by Robert Dilworth. She did not give them any collateral (519, 520). That in June 1975 the account was taken over by Mr. Fleig. Her first conversation with him was in late July or early August. She asked him about her account. That from June 1973 up to May 1975 she submitted eight Air Traffic Conference checks for payment and none of these checks were returned. In May 1974 she received notices from Hempstead Bank relative to the cashing of her checks. That some checks were paid and others were not paid. She remembered this with regard to an Air Traffic Conference check (520, 521). On Exhibits X and Y eight checks were shown. Seven checks were returned and one check in the amount of $18,863.05 was paid. Exhibit Y on May 8, 1974 shows that 2 checks were returned and the third check (an ATC check) in the amount of $20,043.44 was paid (525). On May 14, 1974 they received Exhibit AA dated May 10, 1974 which listed 6 checks. One check of $14,688.67 had been checked off. She called the bank upon receiving it. She spoke with Mr. Fleig who investigated and then advised her that it had been returned by Mr. Marcinkowski who had returned same without consulting anyone in the bank. That she then had funds wired up to Boston (523, 524). Exhibit AB reflected the wire transfer of money to Air Traffic Conference (524). Exhibit AC dated June 11, 1974 indicated that 3 checks had been paid. On June 19 the mailgram was received from ATC (526). She sent a telegram back that there was a mistake (527, 528). (Received as Exhibit O) (528). On June 20 she called the bank but Mr. Fleig was not there. She spoke to Miss La Morell, she checked the available records and advised that they showed that the check was paid (529). The next day she reached Mr. Fleig who informed her that he had returned the check. When she asked him "why," he replied your account was short. When she inquired why did he not call her, he claimed he had called and not received an answer and he thought that they had skipped town (530). When he saw his records indicated the account was short, she told him that there must be an error and further asked him why he did not refer to

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the bank book and he replied that it was frozen against the letter of credit. She replied she did not know of that and in fact he had promised to send her the file but never did. After she spoke to Bob Dilworth, she called back Mr. Fleig and told him that he was putting them out of business, and the bank should rectify the matter, since they were holding the $10,000 bankbook. He replied that he could not state to ATC that he returned same in error (531, 532). She asked for a certified check and he thought that the request was ridiculous and ATC might have redeposited the check. That she prepared a certified check on June 21 (532, 533). The airline representative came to her office just before 3 P.M. He refused to take the check unless it was certified and because it was too late to go to the bank, he directed her to get it certified on Monday morning. On Monday morning she had the check certified and when she was getting the papers ready she noticed that the check read payable to the Hempstead Bank. She then called the bank and they replaced the certified check with a cashier's check (533, 534). That she was kept home by the children's sickness and on the morning she received an order to show cause from the A.T.C. (534) and she went to Court on same. That during the month of June she continued to make deposits in her account. The deposits consisted of mostly corporate checks (535). That on July 22 when she returned from trial, one of the girls in the office handed her a notice from the bank and she opened it up and the notice indicated that all six checks *had been paid* on July 18 against uncollected funds. The notice did *not* say that any of those checks were returned (536). She first received notice that the ATC check was returned on July 24 when she was in the courtroom and Mr. Romans made such a statement (538).

On July 3, Mr. Hagerty went to the office and sat at her desk and said that he was sorry for all the inconveniences and then he took the stock (539). He took the American Airlines ticket stock and the IATA stock (539, 540). That on August 2, or 3, 1974 their stock was officially seized as per the court order. After the seizure she submitted a letter to ATC (541). The court

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wrongfully sustained an objection to the letter (542). She received exhibit N from the American Airline on August 19. She then called Mr. Scantlebury and told him that the best she could do was to get the answer to him by the next morning and he replied that was O.K. (543, 544). Exhibit M was her response to that letter. That she never received the block of 50 tickets mentioned therein (544). What ever she owed American Airlines, she paid them when she sent them her letter (545). There was no doubt that at the time of the trial plaintiff owed defendant some $7,000 for refunded tickets (548-552). Court sustained an objection as to proof of same (552).

On cross-examination Mrs. Monello admitted that during early 1971 that defendant had a secured $10,000 loan with the Hempstead bank. The loan was secured by a passbook (556). That when she drew the check of $14,688.67 she may have looked to see what her bank balance was but she "always knew that the bankbook was there so that I knew that I had $10,000 additional. Mr. Fleig did not tell her that there would have to be good funds in the checking account for that check to be paid (570). In her conversation with him on the 14th she testified that she told him that they had to get funds up to Boston right away and he did not say that they had to get the money into the bank (571). That she called an account (TDK) every morning for a week prior to the time she spoke to Mr. Fleig (573, 574). She later found that TDK had used funds to the Hempstead Bank (575).

Her former testimony was that when she came into the office on June 12 she received the notice from the Hempstead Bank that the check had been paid even though it showed insufficient funds in the account at the time she was about to call the bank and tell them they were wrong. But she had a lot of work to do and she let it go because the *notice said that the check was paid* (587). That the commissions on a flight trip without land arrangemtns was 7 per cent (602).

Frank Monello, defendant's secretary-treasurer testified as to a conversation he had with Mr. Romans on July 2, 1974 (614,

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615). That they asked Mr. Romans if he would settle the case because there was a very questionable doubt about February 20 and Mr. Romans said that the only way he would go it if they surrender the stock. Mr. Monello then told him we cannot surrender the stock because that would put them out of business. He answered that they should be reasonable as it was only for 15 days and:

> "he had the ways and the means so I will never be reinstated" (616)

That on August 2, 1974 he was in the Sheriff's office voluntarily returning all the stock and plates as per the Court order (616). At the time he received a telephone call from Mr. Romans demanding that he get back to his office. There was no ticket stock in his office at the time. That since August 2, 1974 he has kept his office open at the following expense: rent $1,313.76, telephone $1,500, legal fees $4,000, office supplies $200, gasoline $600 and salaries $9,144 for a total of $16,757.76 (617, 618). The article in Sunday Newsday was received in evidence as exhibit 13B 618, 619). The various service charged he incurred for cashing his checks in the Hempstead Bank amounted to a little over $2,000 in 1973 (619, 620), or $2,765 (621). The charges in 1974 were $501 and in 1972 $1912 (621, 622).

On cross-examination Frank Monello testified that the gasoline expense was caused by the fact that defendant's cars had to be used to run around to the different airlines and agencies to pick up and deliver tickets to clients (628). That over the last 8 years he has built up some rapport with his customers (633). That it is illegal to split commissions with other travel agents (634, 635).

THE DEFENSE

Christian A. Fleig, as a witness for Hempstead Bank, testified that at the earlier trial of this matter there was some reference to a savings account register of Salvatore Monello. That they searched their files and found nothing (637, 638). All they found

REPLY AFFIDAVIT OF JOHN N. ROMANS.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

- -x

NORTH SHORE TRAVEL SERVICE, INC., :

Plaintiff, :

-against- :

JOSEPH F. HINTERSEHR, etc., et al., :

Defendants. :

- -x

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REPLY AFFIDAVIT OF JOHN N. ROMANS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN N. ROMANS, being duly sworn, deposes and says:

1. I am associated with the firm of Chadbourne, Parke, Whiteside & Wolff, attorneys for defendants. I am fully familiar with the facts of this action and make this affidavit in reply to the affidavits in support of North Shore's Motion for Partial Summary Judgment and in opposition to defendants' Motion to Dismiss.

No Monies are Owing North Shore by Defendants

2. On page 2 of his affidavit of May 27, 1976, Bernard Meyerson, Esq., counsel for plaintiff states:

> "It is noticed that the moving papers very carefully avoid any reference to these [i.e., '$7,082.90 in refunds received by the airlines who compose the Air Traffic Conference, along with the sum of $2,000 which represents refunded tickets held by plaintiff'] monies so, therefore, admit that same are due plaintiff."

REPLY AFFIDAVIT OF JOHN N. ROMANS.

3. Contrary to Mr. Meyerson's statement, the moving papers do not admit that any monies are due plaintiff.

4. In paragraph 19 of Mr. Saunders affidavit of May 5, 1976, he states:

> "Contrary to the allegations of paragraph 22 of the complaint that ATC refused 'to reimburse Plaintiff for tickets it refunded and returned, which amount to $7,082.90,' the fact is that the ATC member airlines fully credited North Shore with that amount. The ATC member airlines actually had claims against North Shore in the amount of $24,074.51. The $7,082.90 which North Shore claims to be owed reduced the North Shore debt to $16,991.61."

Thus, defendants in their moving papers not only controvert the allegations that any monies are due plaintiff, but show that instead plaintiff owes defendants $16,991.61.

North Shore Waived the Furnishing of a Replevin Bond in the State Court Proceedings

5. At page 4 of Mr. Meyerson's second affidavit of May 27, 1976 [entitled Affidavit in Opposition to Motion to Dismiss], Mr. Meyerson says:

> "First, this Court should refer to the shocking statement found [on Page 8] in the Affidavit of Richard R. Saunders, who claimed that North Shore Travel waived the furnishings[sic] of any Replevin Bond. This is absolutely untrue."

6. Mr. Meyerson continues:

> "This Court will further notice, that the opinion of the Appellate Division - Second Department, was based upon the assumption that a sufficient bond had been furnished for the protection of North Shore Travel Service, Inc.
>
> "Therefore, the Appellate Division was misled, and your deponent has been misled. This is typical of the tactics of defendants throughout this litigation." (Meyerson Aff. pp. 4-5).

REPLY AFFIDAVIT OF JOHN N. ROMANS.

7. It is Mr. Meyerson who was absolutely incorrect -- not Mr. Saunders. Attached hereto as Exhibit A is a copy of the transcript of the proceedings before the State Court on August 1, 1974 (pp. 162-a - 166-a of the Record on Appeal to the Appellate Division). It will thus be seen that Mr. Richard A. Saunders is absolutely correct in his statement in paragraph 14 of his affidavit of May 5, 1976, that North Shore waived the furnishing of a replevin bond.

8. Furthermore, the waiving of this bond was again confirmed by North Shore's counsel on September 18, 1974. Attached hereto as Exhibit B is a copy of page 1 of the affidavit, dated September 18, 1974, of Patrick F. Broderick, Esq., counsel for North Shore in the State Court proceeding. This affidavit was filed by Mr. Broderick in the Appellate Division, Second Department, in support of a motion for a stay of the Order of Seizure.

9. As will be noted, Mr. Broderick expressly states in paragraph 3 of this affidavit: "The condition of an undertaking was waived by the defendant [North Shore]."

10. Contrary to Mr. Meyerson's assertions, the waiving of this bond was specifically called to the attention of the Appellate Division in ATC's brief to the Appellate Division, Second Department. Attached hereto as Exhibit C is a photocopy of pages 15-16 of this brief which shows that ATC specifically called to the attention of the Appellate Division that North Shore had waived the furnishing of a bond.

REPLY AFFIDAVIT OF JOHN N. ROMANS.

WHEREFORE, North Shore's motion for partial summary judgment should be denied and ATC's motion to dismiss the complaint should be granted.

John N. Romans

John N. Romans

Sworn to before me this
28th day of May, 1976.

Notary Public

MICHAEL S. DAVIS
NOTARY PUBLIC, STATE OF NEW YORK
No. 60-4633307 Qual. in Westchester County
Commission Expires March 30, 1978

"EXHIBIT A" ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

to take possession and hold pending the trial of this action.

Anything further?

MR. ROMANS: Now, your Honor, there is a question about the bond. As you know, we have presented a bond and doubled the amount.

THE COURT: Yes.

MR. ROMANS: This would be a disbursement chargeable against the defendant if the defendant loses at the trial.

I have represented to Mr. Broderick that a yearly cost of this bond is approximately $7,000.

Mr. Broderick just stated to me in the courtroom that he had never asked for a bond; is that correct?

MR. BRODERICK: We never asked for a bond.

THE COURT: I understand it is required.

MR. ROMANS: Well, I wonder if --

THE COURT: Well, --

"EXHIBIT A" ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

JUDGE BURSTEIN: Would you check and then would you hand it in.

MR. ROMANS: Your Honor, I have the bond, and it is ready if the Court requires it. My only feeling is that we at A.T.A.A. are not out to heap other expenses on this travel agency.

THE COURT: I think it is required by law.

MR. ROMANS: If the travel agency waives it, I think usually the party can waive it.

MR. BRODERICK: I don't want a bond. I definitely didn't request a $900,000 bond.

THE COURT: Go ahead.

MR. ROMANS: The representation I want to make is very clear to Mr. Broderick. Any expenses to date we will be charged something on this bond because we have already had to present it to the Court and I don't think it will be very much. I

"EXHIBIT A" ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

don't know how much, but that, of course, I am not volunteering to absorb. I am just trying to reduce any disbursements against the defendant if the defendant loses the action, and that's my thought.

THE COURT: Did I understand you to say you wish to place a stipulation on the record?

MR. ROMANS: Yes, your Honor.

THE COURT: All right, counselor, you may proceed.

MR. ROMANS: Thank you, your Honor. It is hereby stipulated and agreed by the attorneys for the plaintiffs and defendant that the bond in this action is waived; and that the parties will proceed to the office of the Sheriff --

MR. BRODERICK: Not the parties.

MR. ROMANS: The attorneys.

MR. BRODERICK: The Sheriff? I am not going there.

MR. ROMANS: Mr. Broderick is not going.

I am going to the Sheriff's office; am I correxct? You have waived any bond?

MR. BRODERICK: Yes, we waive the bond.

MR. ROMANS: And that the plaintiffs will pay for the expenses of renting a safe deposit box which will contain the chattels pending the final disposition of this case, final disposition, and that expense will be a disbursement awarded at the --

MR. BRODERICK: I won't consent to anything. Plaintiff has to submit the bond. The Sheriff pursuant to Court order, the Sheriff is to hold these bonds pending determination of the trial.

MR. ROMANS: The chattels.

MR. BRODERICK: Chattels.

MR. ROMANS: Tickets and related paraphernalia.

MR. BRODERICK: Chattels and everything will be held by the Sheriff pending the determination of this action, not to be returned to the plaintiff after the normal

prescribed ten-day period.

- - -

I N D E X

Witness

RICHARD R. SAUNDERS

Direct Exam	Voir Dire	By Mr. Broderick	Cross Exam
7-13 15-22	13-15	22-23	23-54

INEZ MONELLO

Direct Exam
56-86

E X H I B I T S

PLAINTIFF'S EXHIBITS:		For Iden.	In Evid.
#29 -	Check	11	21
DEFENDANT'S EXHIBITS:			
"AA" -	Report	57	
"BB" -	Communication	62	65
"CC" -	2 sheets of bank records	66	

- - -

"EXHIBIT B" PORTION OF AFFIDAVIT OF PATRICK F. BRODERICK ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

----------X ATTORNEY'S AFFIDAVIT

JOSEPH F. HINTERSEHR, et al,

Plaintiffs,

-against-

NORTH SHORE TRAVEL SERVICE, INC.,

Defendant.

----------X

STATE OF NEW YORK)
) SS.:
COUNTY OF QUEENS)

PATRICK F. BRODERICK, being duly sworn, deposes and says:

1. That he is the attorney for the defendant herein and as such is familiar with the facts and circumstances herein set forth.

2. This action is brought before this Court because the defendant does not presently have any recourse available to it under the existing status of this action.

3. This action was commenced by Order to Show Cause on July 30, 1974 and on August 1, 1974, Justice Burstein of the Supreme Court Nassau County signed an Order whereby the Sheriff of Nassau County replevined the "airline ticket stock" of the defendant. (Contained in plaintiff's affidavit in opposition Exhibit A). The condition of an undertaking was waived by the defendant.

stated in the plaintiff's affidavit" is to make doubly sure that a defendant, such as North Shore, is provided ample security on which to base a possible future recovery of damages, should the court ultimately determine that the order of seizure was issued wrongfully. It makes no sense whatever to argue that ATC was giving North Shore too much protection.

Finally, what makes North Shore's argument totally irrelevant here is that no value was fixed by the court below. ATC had offered to post a bond in the amount of $913,197.92, twice the value of the 2,602 tickets wrongfully withheld by North Shore on August 1, 1974 (162a-163a). Recognizing, however, that it would be held liable to ATC for the approximately $7,000 cost of the premium for such a bond should the trial court hold -- as it ultimately did, following the trial of this action -- that ATC was entitled to recover the airline ticket stock, North Shore waived the furnishing of any bond (164a-165a). Pursuant to stipulation of the parties, the order of seizure accordingly merely provided that the Sheriff should take the chattels into his possession "and hold [them] pending the trial of this action" (12a-13a). Thus, the ticket stock was not returned to ATC "after the normally prescribed

ten-day period" (165a-166a). There is, thus, no basis whatsoever for the ridiculous charge that the court below unconstitutionally placed too high a value on the airline ticket stock in this case. North Shore would have a straw man tilt in the dark at imaginary windmills.

(c) American Airlines Properly Requested That North Shore's Status be Reviewed by ATC's Agency Committee

North Shore further argues at page 27 of its brief that its right to be reinstated as an ATC agent "was overcome by counsel (who also represented American Airline[s] (212) by having Mr. Scantelbury of American Airlines stop the reinstatement with no valid excuse (186, 191, 192)."

This wild argument has no basis in the record. American Airlines - as it had every right to do - requested on August 20, 1974 that the matter of North Shore's reinstatement be held for review by the Agency Committee (Exhibit I; Tr. 133). At that time, Mr. Scantelbury did not even know of the existence of ATC's counsel (Tr. 212). Mr. Scantelbury never talked to ATC's counsel prior to receiving North Shore's subpoena shortly before the trial (Tr. 212). There simply was no evidence that ATC's counsel requested Mr. Scantelbury "to stop the reinstatement".

REPLY AFFIDAVIT OF FRANK MONELLO IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

NORTH SHORE TRAVEL SERVICE, INC., :
Plaintiff, : 76 Civ. 538 (JM)
:
-against- :
:
JOSEPH F. HINTERSEHR, etc., et al., :
Defendants. :
:
- x

STATE OF NEW YORK)
) SS. :
COUNTY OF SUFFOLK)

FRANK MONELLO, being duly sworn, deposes and says:

1. That he is Secretary-Treasurer of North Shore Travel Service, Inc.

2. That based upon the well kept books of North Shore Travel Service, Inc., this affidavit is made in response to the answering affidavit of John N. Romans to the cross-motion for Summary Judgment.

3. Mr. Romans, an attorney, makes the assertion that no monies are owing to North Shore Travel. He fails to introduce any proof to back up his statement, and there is no reason for this Court to take his unsubstantial assertion.

4. On the other hand, your deponent has the well kept books of the corporation and it shows that not one-cent is owed to ATC.

5. Before the Replevin trial, the claim was made that money was owed to American Airlines. Deponent's counsel subpoenaed the

REPLY AFFIDAVIT OF FRANK MONELLO IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

American Airlines Representative, and he admitted that no money was owed American Airlines. If any claim had been made by any other airline, we would have followed through with the same procedure.

All we know is that after we remitted $7,000 in tickets, ATC refused to refund the money to us, and then stated that we owed them money, but refused to give us any details. ATC stated there were outstanding claims and that they would advise us further to that effect.

6. The next thing we know is that our bonding company, who is procured by ATC, wrote us that ATC had demanded that they pay $20,000 some odd. We tried to get details from the bonding company but they refused. The bonding company claimed that it approved and paid $12,000 to ATC and is now sueing us for this amount. The bonding company will never be able to prove any such claim.

Thus according to the records of ATC that were submitted to the bonding company, they have been paid by the bonding company.

Evidently, when our summons and complaint was served, ATC was caught by surprise when it found that we are demanding some $2,000 extra for returned tickets.

Accordingly, when we now move for Partial Summary Judgment, Mr. Romans in opposition thereof, and without submitting any records of the tickets and the airline who issued the tickets, has suddenly increased the ATC claim to $24,074.51.

Consequently, this Court should ignore the affidavit of Mr. Romans and grant the cross-motion for Partial Summary Judgment.

REPLY AF DAVIT OF FRANK MONELLO IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

7. As to the waiver of the bond for the writ of replevin, the "Exhibit A" attached to Mr. Romans' affidavit clearly shows that after much negotiating, Mr. Broderick got disgusted and changed his previous offer to waive bond and stated:

> "MR. BRODERICK: I won't consent to anything. Plaintiff has to submit the bond. [to] the Sheriff pursuant to Court order, the Sheriff is to hold these bonds [the chattels] pending determination of the trial."

Accordingly, this was followed by a signing of the writ of seizure, with the recitation:

> "AND, it further appearing that an undertaking executed by sufficient surety as required by law having been submitted herewith,"

My present counsel and myself are not familiar with the alleged affidavit marked "Exhibit B", which contains the statement of Mr. Broderick that he had waived the bond. Evidently, Mr. Broderick was confused and had forgotten that he had reversed his previous offer to waive the bond. This mid-statement cannot validate the invalid Order of Seizure.

WHEREFORE, your deponent requests the relief demanded in the cross-motion for Partial Summary Judgment and in the answering affidavit be granted by this Court.

FRANK MONELLO

Sworn to before me this
1st day of June, 1976

- - - - - - - - - - - - -

LETTER OF JOHN N. ROMANS TO COURT, DATED JULY 15, 1976.

CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 ROCKEFELLER PLAZA, NEW YORK, N. Y. 10020
(212) 541-5800

WASHINGTON, D. C. OFFICE
1150 17TH STREET, N. W.
WASHINGTON, D. C.
20036

COPY

July 15, 1976

The Honorable Jacob Mishler
Chief Judge
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: North Shore Travel Service, Inc.
v. Joseph F. Hintersehr, et al.
76 Civ. 538 (JM)

Dear Judge Mishler:

In our papers and on the oral argument of our motion to dismiss the complaint argued June 4, 1976, we discussed a similar case involving the same parties and similar facts which was then pending in the New York Court of Appeals. I enclose a decision of that court, received this morning, denying North Shore Travel Service's motion for leave to appeal.

Respectfully,

John N. Romans

Enclosure

cc (w/encl.)

Bernard Meyerson, Esq.

COPY OF OPINION ANNEXED TO LETTER OF JOHN N. ROMANS,
DATED JULY 15, 1976.

2 Mo. No. 668
Joseph F. Hintersehr, et al.,
Respondents,
vs.
North Shore Travel Service,
Inc.,
Appellant,
and Hristensen A. Fleig &ors.,
Additional Defendants on Claims,
Respondents.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

ANSWER LETTER OF BERNARD MEYERSON, DATED JULY 20, 1976.

BERNARD MEYERSON
ATTORNEY AT LAW
16 COURT STREET
BROOKLYN, N. Y. 11201
643-1335

July 20, 1976

The Honorable Jacob Mishler
Chief Judge
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

RE: North Shore Travel Service, Inc.,
v. Joseph F. Hintersehr, et al.
76 Div.

Dear Judge Mishler:

I have received a copy of the letter sent to you by my opponents dated July 15, 1976.

May I at this time state that this decision does not end the case in the State Court. Due to the fact that I was alerted by my opponent's affidavit in opposition to the motion for summary judgment, I saw fit to conduct extensive investigations to ascertain the details alleged in the affidavit. As a result, I am now preparing two motions for a new trial on newly discovered evidence. The first is that the Court did not have jurisdiction of the action and the second is based upon the fact that the Trial Judge was not qualified to hear the action.

I am taking the liberty to enclose pages 626 and 627 of Moore's Federal Practice Volume 1B which details the effect of a judgment in an in-rem action.

Respectfully,

BERNARD MEYERSON

BM:RHM
Enc.

OPINION OF JUDGE JACOB MISHLER.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -

76 C 538

NORTH SHORE TRAVEL SERVICE, INC.,

Plaintiff,

-against-

Memorandum of Decision and Order

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association; PAUL R. IGNATIUS, as President of the Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; WILLIAM M. HAWKINS, JR., as Executive Secretary of the Airline Finance and Accounting Conference, a division of the Air Transport Association of America, AIR CANADA, ALLEGHENY AIRLINES, INC., ALOHA AIRLINES, AMERICAN AIRLINES, INC., BRANIFF INTERNATIONAL, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, EASTERN AIR LINES, INC., HAWAIIAN AIR LINES, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, NORTHWEST AIRLINES, OZARK AIR LINES, PIEDMOND AVIATION, SOUTHERN AIRWAYS, TRANS WORLD AIRLINES, INC., and UNITED AIR LINES, INC.,

Defendants.

September 21, 1976

- -

MISHLER, CH. J.

OPINION OF JUDGE JACOB MISHLER.

Plaintiff commenced this action seeking damages resulting from alleged antitrust violations committed by defendants, and requesting the empaneling of a three-judge court, pursuant to 28 U.S.C. §2281, to determine the constitutionality of New York State's statutory replevin procedures, CPLR §7101 et seq. Pursuant to Rule 56, defendants have moved for summary judgment, and plaintiff has cross-moved for partial summary judgment.

Plaintiff, a New York corporation, operates as a travel agency in Syosset, New York. The defendants collectively are officers of the Air Transport Association of America (ATAA), an association of air carriers, and officers of the Air Traffic Conference of America (ATC), and Airline Finance and Accounting Conference (AFC), both of which are divisions of ATAA. The ATAA exists as a non-governmental organization operating with Civil Aeronautics Board (CAB) authorization. The ATC division acts as agent for the airlines in their transactions with travel agencies, which reserve and sell airline transportation to individual customers. Governing the relationships of the parties is a resolution, authorized by the CAB, known as the ATC Sales Agency Agreement. These agreements in short, operate to

appoint travel agencies such as North Shore, trustees of the airlines, empowering them to hold the airline's tickets for sale to the public. Under the agreement proceeds of an agency's sales, less commissions, are to be remitted to the airlines three times monthly. The contract further provides for the suspension and termination of a travel agency's certification upon breach of the agreement's operating terms; four late remittances within any twelve month period constitute sufficient grounds. Upon suspension, the agency must surrender the airline tickets it holds until reinstatement.

Pursuant to 49 U.S.C. §1382, the agreements and resolutions were filed with and approved by the CAB. In accordance with 49 U.S.C. §1384, such approval ordinarily serves to immunize the authorized groups from operation of the "antitrust laws," thereby enabling them to engage in activities consistent with the agrement that might otherwise be unlawful. However, such statutory immunity is not absolute. If a claim is made that the procedures thus approved are subsequently perverted to accomplish some result not within the Board's contemplation, it is arguable that the statutory protections should fall. See Hughes Tool Co. v.

Trans World Airlines, Inc., 409 U.S. 363, 93 S.Ct. 647 (1973), rehearing denied, 410 U.S. 975, 93 S.Ct. 1434 (1973); Caceres v. International Air Transport Assn., 46 F.R.D. 89 (1969). Putnam v. Air Transport Assn. of America, 112 F. Supp. 885 (S.D.N.Y. 1953). It is plaintiff's contention that certain of defendants' actions exceeded the scope of procedures authorized by the CAB and therefore, the statutory immunity otherwise afforded by 49 U.S.C. §1384 should fail. As such, plaintiff argues, defendants should be held liable for damages caused by alleged violations of the antitrust laws.

Pursuant to contractual notice provisions, a letter dated July 29, 1974, was forwarded from ATC offices apprising North Shore Travel of ATC's decision to suspend the then existing Agency Agreement. The ATC stated as its basis for the suspension, North Shore Travel's accumulation of five "late remittance charges"[/1] within a twelve-month period.

/1 An agent could be charged with a "single late remittance charge" if he failed to timely remit proceeds or could be charged with two "late remittance charges" should a check be dishonored.

This suspension notice, however, had been preceded by an attempt to cancel North Shore's privileges after the May 31st reporting period. When North Shore had refused to surrender its tickets pursuant to the Agency Agreement, the ATC commenced an action in Nassau County Supreme Court to recover possession of airline tickets and related sales paraphernalia which was in North Shore's possession. ATC had based that suspension upon North Shore's alleged accumulation of four "late remittance charges" within a twelve-month period. North Shore counterclaimed alleging that ATC had acted in a willful, intentional and malicious manner in suspending North Shore's privileges and that ATC had breached a fiduciary relationship in initiating the replevin action before notifying North Shore.

An opinion by Justice DePaolo held that only the "late remittance charges" for the periods ending April 30, 1974 and May 31, 1974 were proper. Finding, therefore, that only three "late remittance charges" remained outstanding, one less than was required by the agreement in order to suspend North Shore's operations, the court dismissed ATC's action. Justice DePaolo also dismissed the counterclaims as North Shore failed to establish any of its claims.

The July 29th letter cited the three charges found valid by Justice DePaolo, as well as two "late remittance charges" incurred during July 1974, as the basis for suspending North Shore's operations. In response, North Shore filed an immediate request for reinstatement in accordance with Agency Agreement provisions. /2 In conjunction with the suspension, ATC again commenced a replevin action in Nassau County Supreme Court when a demand for the surrender of the ticket stock was refused.

On August 1, 1974, after a hearing at which both the ATC and North Shore were present, Justice Burstein signed an order authorizing seizure of the airline tickets in North Shore's possession. Justice Burstein found that ATC had shown sufficient facts to satisfy the due process requirements of the fourteenth amendment and as such, seizure was proper.

/2 Under the terms of the operating Sales Agency Agreement, a suspended travel agent may file a request for reinstatement. Such a request is immediately transmitted to the member airlines, and they are asked to forward their objections. If within fifteen days no member airline requests the matter be held for review, automatic reinstatement is effected. Herein, North Shore filed for reinstatement on the same date it received the suspension notice, July 29, 1974. Twelve days later, on August 9, 1974, American Airlines teletyped ATC offices requesting reinstatement be held up.

North Shore next impleaded into the action, the Hempstead Bank, where it retained its checking account. North Shore alleged that the ATC induced the bank to breach its contract with North Shore, and that as a result, the bank willfully and maliciously dishonored the checks leading to the citation of the "late remittance charges" and the suspension. A short time later, during trial preparations, ATC was informed by the Insurance Company of North America that North Shore's surety bond, required by the Sales Agency Agreement, was to be cancelled. ATC, by letter dated August 7, 1974, informed North Shore, that, pursuant to the provisions of the Sales Agency Agreement, ATC would terminate North Shore's privileges unless the bond was reinstated or replaced. North Shore subsequently failed to effect reinstatement or replacement, and a termination notice issued on October 11, 1974.

The second replevin trial was held in October, 1974, before Justice Lynde. The court, in a written opinion held that:

(1) the previous decision by Justice DePaolo as to the validity of the "late remittance charges" for the April 30 and May 31, 1974, reporting periods was res judicata;

(2) that the "late remittance charges" for the July 10, 1974 period were proper;

(3) that because North Shore had incurred five"late remittance charges"within a twelve-month period, automatic suspension of North Shore by ATC was rightful and proper; and

(4) that the bank's actions in not honoring North Shore's checks was justifiable, and that the bank had not agreed to pay overdrafts.

North Shore subsequently appealed to the New York Appellate Division for the Second Department which affirmed Justice Lynde's decision. North Shore's motion for leave to appeal to the New York Court of Appeals on the ground that the New York replevin statutes, N.Y.C.P.L.R. §§7101 et seq., are unconstitutional was denied.

The hesitancy with which the courts should proceed before granting summary judgment has been consistently emphasized within this circuit, see Heyman v. Commerce and Industry Insurance Company, 527 F.2d 1317 (2d Cir. 1975), Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946). It is an extreme remedy demanding the clearest establishment of a

right to judgment before it is to issue. Ozark Milling Co. v. Allied Mills, Inc., 480 F.2d 1014, 1015 (8th Cir. 1973). Only where the record disclosed the absence of genuine issues as to material facts, and only issues of law remain is summary judgment proper. Heyman v. Commerce and Industry Insurance Company, supra at 1319-1320. The fact that cross-motions for the remedy are before the court does not lead to the conclusion that the standards should be lowered; the same caution should be employed, Heyman v. Commerce and Industry Insurance Company, supra at 1320. Applying the above notice principles to the instant matter, it is apparent that summary judgment is appropriate.

In Lowe v. International Air Transport Association Civil No. 69-4788 (S.D.N.Y. January 9, 1976), cited by plaintiff, the defendants' failure to consider relevant rebuttal evidence at a hearing to review a travel agency's suspension, and its subsequent failure to issue a particularized notice of termination was held to have exceeded the procedural guidelines of the Agency Agreement authorized by the CAB. Noting that courts have consistently demanded strict compliance with prescribed procedures in order that immunity attach, the court concluded that defendant's

failings served to deprive them of the statutory immunity otherwise afforded by 49 U.S.C. §1384. Plaintiff contends that certain conspiratorial acts between the ATC, the bank, and the insurance company enabled defendants to circumvent the prescribed procedures in terminating North Shore and that such acts exceeded the intended scope of CAB authorization. As such, plaintiffs argue, statutory immunity should be withdrawn and its claim for damages allowed.

North Shore once again raises allegations of a conspiracy between the ATC and Hempstead Bank to drive it out of business. Arguing the "suspicious" circumstances under which checks to the ATC were dishonored, plaintiff claims the "late remittance charges" and the suspension of July 29, 1974 were unwarranted. It is not necessary to once again recount the details cited by plaintiff in support of its assertion. This matter was fully litigated in the state courts. Justice Lynde found the checks were appropriately dishonored and that no agreement existed for the bank to pay overdrafts. Moreover, the Appellate Division specifically held that North Shore's allegations were founded on suspicion and not evidence. Hence the doctrine of res judicata bars relitigation of the claim. The fact that judgment was

OPINION OF JUDGE JACOB MISHLER.

rendered by a state court is not an impediment to the application of this rule as that judgment is entitled to full faith and credit. Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242 (1963).

Plaintiff, by affidavit of Frank Monello, sworn to June 1, 1976, suggests that ATC improperly applied pressure on the Insurance Company of North America to cancel the surety bond. North Shore argues that this alleged overreach permitted termination thereby circumventing review of the propriety of the suspension letter. Yet, plaintiff offers nothing in support of this bare allegation. A bald assertion is insufficient to raise a material issue of fact barring summary judgment. Rule 56(e) F.R.C.P. Nor can such an unsupported claim be the basis of an alleged antitrust violation.

North Shore further alleges the insufficiency of the termination notice. Plaintiff argues that the defendant's failure to remit the unused portion of the bond premium rendered termination ineffective. Defendant on the other hand, asserts the amount was deducted from the sum due and owing ATC because of the dishonored checks. This inconsistency, however, does not raise a material issue of fact. A failure to refund the unused amount at most gives

rise to a contract claim. Plaintiff, therefore, has failed to show that the procedural requirements of the Agreement have been breached by defendants and that immunity should fail.

North Shore also attacks the constitutionality of New York State's replevin statute. N.Y.C.P.L.R. §7101 et seq., and seeks the convening of a three-judge court to determine the issue. More specifically, plaintiff asserts that CPLR 7102(e) prescribing the undertaking to be furnished in a replevin action, fixing it at "not less than twice the value of the chattel stated in plaintiff's affidavit," violates the Equal Protection Caluse of the fourteenth amendment. Collateral issues having been litigated in the state court, it was entirely possible and wholly appropriate for plaintiff to have asserted this contention simultaneously. The doctrine of res judicata bars relitigation of issues that were or could have been tried in the initial action. Blankner v. City of Chicago, 504 F.2d 1037 (7th Cir. 1974), cert. denied, 421 U.S. 948, 95 S.Ct. 1678, rehearing denied, ____ U.S. ____, 95 S.Ct. 2618 (1975). North Shore's challenge to the validity of the state court judgment on constitutional grounds was available through application for certiorari

to review the New York Court of Appeals' denial of leave to appeal. See Mitchell v. W.T. Grant Co., 415 U.S. 600, 94 S. Ct. 1895 (1974).

For the reasons heretofore cited, defendants' motion for summary judgment is granted and plaintiff's cross-motion for partial summary judgment is denied, and it is

SO ORDERED.

U. S. D. J.

FINAL JUDGMENT

CLOSED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

NORTH SHORE TRAVEL SERVICE, INC.,

Plaintiff,

- against -

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association; PAUL R. IGNATIUS, as President of the Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; WILLIAM M. HAWKINS, JR., as Executive Secretary of the Airline Finance and Accounting Conference, a division of the Air Transport Association of America, AIR CANADA, ALLEGHENY AIRLINES, INC., ALOHA AIRLINES, AMERICAN AIRLINES, INC., BRANIFF INTERNATIONAL, CONTINENTAL AIR LINES, INC., DELTA AIRLINES, EASTERN AIR LINES, INC., HAWAIIAN AIR LINES, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, NORTHWEST AIRLINES, OZARK AIR LINES, PIEDMOND AVIATION, SOUTHERN AIRWAYS, TRANS WORLD AIRLINES INC., and UNITED AIR LINES, INC.,

Defendants.

----------x

JUDGMENT

76 C 538

A memorandum and order of Honorable Jacob Mishler, United States District Judge, having been filed on September 22, 1976, granting defendants' motion for summary judgment and denying plaintiff's cross-motion for partial summary judgment, it is

FINAL JUDGMENT.

ORDERED and ADJUDGED that plaintiff take nothing of the defendants and that defendants' motion for summary judgment is granted and plaintiff's cross-motion for partial summary judgment is denied.

Dated: Brooklyn, New York
September 22, 1976

Lewis Orgel
Clerk

COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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NORTH SHORE TRAVEL SERVICE, INC.,

Plaintiff,

-against-

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, an unincorporated association; PAUL R. IGNATIUS, as President of the Air Transport Association of America; GEORGE A. BUCHANAN, as Executive Secretary of the Air Traffic Conference of America, a division of the Air Transport Association of America; WILLIAM M. HAWKINS, JR., as Executive Secretary of the Airline Finance and Accounting Conference, a division of the Air Transport Association of America, AIR CANADA, ALLEGHENY AIRLINES,INC., ALOHA AIRLINES, AMERICAN AIRLINES, INC., BRANIFF INTERNATIONAL, CONTINENTAL AIR LINES, INC., DELTA AIR LINES, EASTERN AIR LINES, INC., HAWAIIAN AIR LINES, NATIONAL AIRLINES, INC., NORTH CENTRAL AIRLINES, NORTHWEST AIRLINES, OZARK AIR LINES, PIEDMONT AVIATION, SOUTHERN AIRWAYS, TRANS WORLD AIRLINES, INC., and UNITED AIR LINES, INC.

Defendants.

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COMPLAINT

Plaintiff, by its attorney, BERNARD MEYERSON as and for its complaint herein against defendants, respectfully alleges:

FIRST CLAIM:

1. The jurisdiction of this Court is invoked, under the provisions of Title 15, United States Codes, Section 1, 2 and 15, to recover damages and for other relief in connection with violations of defendants of the antitrust laws of the United States, hereinafter alleged along with violation of plaintiff's rights, under the Fourteenth Amendment to the Constitution

of the United States.

2. Plaintiff is a New York corporation and engages in business as a travel agent in the City of Syosset, County of Nassau, State of New York.

3. Each defendant, (collectively hereafter referred to as "Airlines") other than the individuals composing the Air Traffic Conference, is a corporation, organized and existing under and by virtue of the laws of one of the several states or in a foreign nation and, each of the defendant Airlines transacts business or maintains an office or is found and, is subject to suit within the Eastern District of New York.

4. Each of the Airlines engages in the business of operating a commercial airline, carrying passengers or cargo or both among the several states of the United States, its possessions and one or more foreign nations. The business of each of the Airlines affects interstate and foreign commerce.

5. Defendants, Air Traffic Conference of America ("ATC"), is an association of air carriers and alleged to be a division of the Air Transport Association of America ("ATA"), as a non-governmental organization existing with permission of the Civil Aeronautics Board of the United States and ATA maintains an office or transacts business or is found and, is subject to suit within the Eastern District of New York and the Air Traffic Conference is a division of same.

6. That at all times herein relevant, the Air Traffic Conference, as a Division of the Air Transport Association of America, acted as agents for the Airlines. The business of Air Traffic Conference affects interstate and foreign commerce.

7. That the Airlines acted through the individuals set forth above.

8. That the Airlines, as members of the ATC and the Air Transport Association of America, meet periodically and enter into agreement and each of the Airlines hold a single vote.

9. That at all times relevant, there has been in effect Agreements and Resolutions, among the Air Traffic Conference and the Airlines, entitled Sales Agency Agreement.

10. That at all times herein relevant, the Agreements contained many clauses and a provision that allegedly allowed the Air Traffic Conference to suspend the certification of the agency, upon its being charged with four (4) violations (four late remittances or two dishonored checks) within one year, pending review by the Agency Committee of the ATC at its next applicable meeting, with the right to request reinstatement with an explanation and, with the right of reinstatement if, within fifteen (15) days, no member airline requests that the matter be held for review by the Committee.

11. By reason of the provisions of the Agreements, the Airlines and the ATC have agreed between and among themselves that, a person or corporation engaged in business as a Travel Agent may not receive commissions from any of the Airlines for sale of passenger air transportation procured by the Travel Agent unless the Travel Agent is approved and retained as a Passenger Sales Agent on a list for such maintained by the ATC.

12. By reason of the provisions of the Agreements, the Airlines and ATC have agreed between and among themselves that, a Travel Agent may neither be approved or retained as a Passenger Sales Agent on ATC's List nor be appointed or retained as an agent of any of the air carrier members of ATC, including the Airlines, unless the Travel Agent conforms to the requirements of the Agreements.

13. At all times herein relevant and until Plaintiff had been approved and was retained as a Passenger Sales Agent on ATC's List and further had been appointed and retained as an agent for certain of the Airlines.

14. In connection with the aforesaid appointments and retentions, Plaintiff derived substantial profits by reason of commission on sales of passenger air transportation and by reason of other sales of supplementary services.

15. By consummating and performing the Agreements, ATC and the Airlines have entered into and performed contracts, combinations and conspiracies in restraint of trade and commerce among the several states and

with foreign nations and have monopolized a part of the trade and commerce among the several states and with foreign nations, all in violation of Title 15, United States Code, Sections 1, 2 and 15. More particularly, ATC and the Airlines have boycotted and prevented Travel Agents who purportedly do not conform to the requirements of the Agreements from being approved and retained as a Passenger Sales Agent on ATC's List and from being appointed and retained as an Agent of any of the air carrier members of ATC, including the Airlines.

16. Pursuant to Title 49, United States Code, Section 1384, any person affected by an order made under Section 1382 of said Title is relieved from the operation of the antitrust laws of the United States:

> "insofar as may be necessary to enable such person to do anything authorized, approved or required by such order."

17. In accordance with the provisions of Title 49, United States Code, Section 1382(a), every one of the Airlines which is an air carrier [as defined by Title 49, United States Code, Section 1301(3)] must file with the Civil Aeronautics Board (hereafter the "CAB") any agreements affecting air transportation entered into between or among such of the Airlines and any other carrier.

18. In accordance with the provisions of Title 49, United States Code, Section 1382(b), the CAB must then make an order either disapproving any such agreement filed with it by such air carriers which the CAB finds to be adverse to the public interest or in violation of Title 49,

United States Code, Chapter 20, or approving any such agreement (or modification or cancellation thereof) which the CAB does not find to be adverse to the public interest or in violation of such statute.

19. The Agreements have been approved by the CAB in the manner herein described.

20. In approving the Agreements the CAB ordered that in each case where the approved status of a Travel Agent, as a Passenger Sales Agent, is terminated, cancelled or suspended, the notice of such termination, cancellation or suspension must be in writing sent directly to the Travel Agent and must state the reasons for such termination, cancellation or suspension in sufficient detail. The CAB further ordered that the aforesaid written notice must be so detailed as to inform the Travel Agent of the factual discrepancies between the Travel Agent's qualifications and the standards set forth in the Agreements.

21. By letter of ATC dated July 29, 1974, copy annexed as "Exhibit A," mailed to Plaintiff, ATC purported to notify Plaintiff that it had cancelled Plaintiff's ATC approval and the Plaintiff's Standard Sales Agency Agreement was to be suspended from the date of the letter and, that air carrier members of ATC, including the Airlines, would cancel any Certificates of Appointment issued to Plaintiff not later than that date, with the right to apply for immediate reinstatement with sufficient explanation.

22. The notice did not state that the ATC was aware that the last check was returned under suspecious circumstances that indicated a conspiracy or deliberate attempt to drive the Plaintiff out of the travel business after its attorney had made such threats so, therefore, it was first going to seek a determination in the New York State Supreme Court

The notice also did not state that it intended to commence the suit by a Writ of Replevin so that same could be published in the newspapers and thus ruin Plaintiff's business, copy annexed as "Exhibit B", reputation and acare its clients into asking for refunds on tickets sold to them and, then refuse to reimburse Plaintiff for tickets it refunded and returned, which amount to $7,082.90.

23. That pursuant to said notice, Plaintiff applied for reinstatement with sufficient explanation of the reasons for the return of the checks.

24. That no objections were made within the required fifteen (15) day period but, on the sixteenth (16) day the American Airlines representative sent the following teletype, copy Annexed as "Exhibit C", against lifting the suspension:

> "RE A.B. 634 AUG.9 NORTH SHORE TVL SVC.
> INC. SYOSSET, NY CODE 784302 REQUEST
> HOLD OFF REINSTATEMENT UNDER SEC VII C
> UNTIL FURTHER NOTICE."

and without any explanation for its opposition and, to the knowledge of Plaintiff's officers, said opposition was based on personal grievances and not on reasonable grounds.

25. That all decisions of the ATC were arbitrary, made by its officers without a meeting of the Airline Representative, without giving Plaintiff an opportunity to rebut the claim and without being allowed to resort to arbitration for a reversal of the unjust decision.

26. That after the Plaintiff was effectively put out of business, the ATC cancelled his Certificate of Appointment on the ground that Plaintiff did not subsequently renew its bond although the ATC was well aware that renewing the bond, while under suspension and after the Airlines ticket stock and plates had been taken from it, was a useless gesture and, thereafter the defendants, without cause, withdrew Plaintiff's right to review before the December, 1974 meeting of the ATC's Agency Committee Meeting.

27. Pursuant to the letter of ATC, Plaintiff's approval and retention as a Passenger Sales Agent on ATC's List and as an agent for certain of the Airlines was terminated and cancelled and, ATC and the Airlines have boycotted and prevented and continue to boycott and to prevent Plaintiff from being the agent of any of the Airlines, all to the damage of Plaintiff.

28. By reason of the actions of ATC and of the Airlines as described herein, Plaintiff is prevented from selling passenger air transportation and has suffered the loss and will continue to lose all profits derived from commissions on such sales and from other sales of supplementary services. In addition, Plaintiff's business reputation and image in the

travel industry and Plaintiff's ability to obtain credit and conduct business has been severely damaged.

29. The suspension and refusal to reinstate or allow arbitration was violative of the Agreements and of the orders and rules of the CAB.

30. The actions of the ATC and of the Airlines as described herein were neither authorized, approved nor required by any order of the CAB. By reason whereof the ATC and the Airlines are not relieved of the operation of the antitrust laws of the United States with respect to Plaintiff for the matters alleged herein.

31. By virtue thereof, Plaintiff has been injured in his trade, business and property.

SECOND CLAIM:

32. Plaintiff realleges each and every allegation in paragraphs "1" through "28" as if set forth in length herein.

33. That during a prior trial, in the Supreme Court in Nassau County, involving the first three checks, counsel for the ATC stated that he would put Plaintiff out of business, "I have the ways and the means so that you will never be reinstated."

34. That during that trial, an employee of Plaintiff's bank called the bank to ascertain if there was a folder that contained a bankbook and hypothecation to protect the bank when it paid checks drawn on uncollected funds and it was ascertained that such a file existed and, said file thereafter disappeared when given to bank official.

35. That a check dated July 15, 1974 in the sum of $16,917.47 was duly sent to the office of the ATC in Boston and that this check was unduly rushed to New York to present same to Plaintiff's bank in the shortest possible time. That although it is the belief of Plaintiff that sufficient funds were in the bank to pay the last check presented, the bank claimed that the check was drawn against uncollected funds but, nevertheless sent Plaintiff a notice that it had paid the check.

36. The Plaintiff's officers were unaware that the check had not been paid and would have seen that it was paid, if it had not been mislead by the notice.

37. That in the State Court, Plaintiff claimed that there was a deliberate conspiracy between the ATC, its counsel and the bank's employees to damage Plaintiff's standing and thus cause it to lose its certification to sell airline tickets.

38. That the Supreme Court did not make specific findings on these facts as directed by the CPLR 4213(b). The Appellate Division, however, handed down a memorandum that stated that these facts

"were founded on suspicion, and
not on evidence."

39. That in view of the suspicious nature of the situation ATC did not start the usual procedure warranted by its Agreements and the rules of the CAB, but instead issued a Writ of Replevin against Plaintiff to start suit to revoke its Appointment for the return of the check of Plaintiff that the bank alleged was drawn against uncollected funds.

40. The service of the Writ of Replevin was part of the conspiracy or scheme on the part of the Airlines and the ATC to ruin the reputation of Plaintiff as it enabled Defendants to give same to the newspapers, copy Annexed as "Exhibit D", so that publication of same would ruin the business reputation of Plaintiff.

41. Because ATC saw fit to bring this lawsuit by first serving the Writ of Replevin, Plaintiff was entitled to continue its business after first posting a bond for double the amount of the value of the property (plates and blank tickets) seized by the Sheriff of Nassau County. [CPLR 7102, 7103]

42. To prevent Plaintiff from reclaiming the material seized , the ATC fixed a ridiculous high value on same to wit the sum of $456,598.96.

43. This ridiculous value was deliberately fixed by the ATC with the knowledge that no firm of Plaintiff's type could ever raise a bond in the sum of nearly one-million dollars to obtain back the seized property.

44. The section of the CPLR under which the ATC acted is unconstitutional as it violated the Equal Protection Clause of the Fourteenth Amendment.

WHEREFORE, plaintiff demands judgement as follows:

1. For damages in the First Claim in the sum of $750,000.00 trebled to $2,250,000.00.

2. That defendants pay back to plaintiff the sum of $7,082.90 in refunds received, along with $2,000.00 worth of refunded tickets held by plaintiff.

3. To convene for the purpose of hearing and determining this application, a Statutory Court of three judges, one of whom shall be a Circuit Judge in accordance with the provisions of Section 2284, Title 28, United States Code.

4. Together with interest, the costs of this suit and reasonable attorney's fees.

5. Plaintiff hereby demands pursuant to Rule 38 Federal Rules of Civil Procedures, that all of the issues in the above entitled action be tried by a jury.

Dated: Brooklyn, New York
February 29, 1975

BERNARD MEYERSON
Attorney for Plaintiff
16 Court Street
Brooklyn, New York 11241
(212) 643-1335

"EXHIBIT A" LETTER DATED JULY 29, 1974 ANNEXED TO COMPLAINT.

Air Traffic Conference of America

A Division of Air Transport Association of America

1709 New York Avenue, N.W. • Washington, D. C. 20006

AGENCY DIVISION

Phone (202) 872-4076

July 29, 1974

Northshore Travel Service, Inc.
40 Underhill Boulevard
Syosset, New York 11791

Gentlemen:

Notice is hereby given that (a) the Agency Committee of the Air Traffic Conference will review the eligibility of your agency for continued inclusion on the Agency List at a meeting scheduled for December 1974, in accordance with Section IV.I of the Resolution 80.10, (see page seven (7), Section 80 of the Travel Agents Handbook) and (b) your reduced rate transportation privilege will be suspended for a period of twelve (12) months from the date of this letter.

The reason for such action is that, during the most recent twelve (12) consecutive months, you have failed to transmit your report and/or remittance as prescribed by Paragraph 5 of the ATC Sales Agency Agreement which, in turn, has resulted in at least four (4) late remittance charges against your agency.

Our records indicate that advices from this office were sent to you concerning such late reports and/or remittances for the following sales report periods:

Reporting Periods	Late Remittance Charges
April 30, 1974	1
May 31, 1974	2
July 10, 1974	2

Under the provisions of the Air Traffic Conference Agency Resolution, you are to cease immediately the sale of air transportation under your ATC Sales Agency Agreement and are to surrender all supplies of standard tickets, miscellaneous charges orders, unused reduced rate trip authorizations, other forms, and identification plates to an industry representative who has been appointed.

Any comments, explanations, or other evidence or rebuttal you may wish to submit should be in our hands well in advance of the meeting.

"EXHIBIT A" LETTER DATED JULY 29, 1974 ANNEXED TO COMPLAINT.

However, as a possible means of gaining reinstatement prior to review by the Committee, you may avail yourself of the following procedures:

You may submit a request for reinstatement, accompanied by written explanations of the reasons for each late remittance, the measures you have taken to avoid recurrences, and justification for prompt reinstatement.

Immediately upon receipt of your request for reinstatement and confirmation from the coordinator that ticket stock and the other previously mentioned items have been surrendered, your request will be circulated to the appointing members.

Unless, within fifteen (15) days after the circulation of your request, an appointing member airline requests that the matter be held for review by the Committee, you will be reinstated.

However, reinstatement pursuant to the procedures set forth above will result in the reduction of the aforementioned numbers of charges prior outstanding notices, unless otherwise notified.

As aforesaid, reinstatement of your agency on the Agency List will not result in an immediate restoration of your reduced rate transportation privilege.

We trust that you will give this matter your prompt attention.

Very truly yours,

Richard R. Saunders
Director - Agencies

RRS/kor

cc: Coordinating Airline

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

"EXHIBIT B" ANNEXED TO COMPLAINT

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rchase

Airline Tickets Seized At Syosset Travel Firm

Syosset—Acting under a judicial order, Nassau sheriff's officers have seized 2,600 airline tickets and validating stamp plates from a Syosset travel agency because of the agency's alleged failure to pay airlines on time for its ticket sales.

The action, which stems from a suit by the Air Transport Conference of America against North Shore Travel Service Inc., 40 Underhill Blvd., resulted in a seizure order, issued Thursday by State Supreme Court Justice Frank X. Altimari.

Officials of the conference, an organization of U.S. airlines, charged that North Shore Travel defaulted on its contract with the conference because of late payment and a bad check for a 10-day payment period ending July 10. The conference said the confiscated tickets and validating plates were worth more than $450,000.

The agency's owner, Frank Monello, and his attorney, Patrick F. Broderick of Queens, charged that conference officials had influenced the Hempstead Bank to return a $16,917 check covering airline ticket sales receipts for the period ending July 10. They said that the agency's deposits last month would have covered the check.

But when asked by Altimari at a hearing Thursday if he planned to file a conspiracy complaint, Broderick said that he did not have sufficient time to investigate and summon witnesses. Altimari then granted the motion for the seizure order, and the tickets and plates were confiscated Friday.

According to the conference, the problems with the July check caused the agency to exceed the amount of late remittances allowed in any 12-month period and justified suspending the contract. North Shore Travel won a decision in State Supreme Court trial last month in which the conference sought to suspend its contract with the agency on the basis of unpaid checks for April and May. Monello said the seizure, unless reversed, would put his agency out of business, and that he will appeal.

Sniffles Are on the Rise As Pollen Starts to Fly

Seven per cent of Long Island's population suffers from

BEST COPY AVAILABLE

"EXHIBIT C" ANNEXED TO COMPLAINT.

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RE A. B. 634 AUG 9 NORTH SHORE TVL SVC INC. SYOSSET, NY CODE
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REQUEST HOLD OFF REINSTATEMENT UNDER SEC VII C UNTIL FURTHER
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